Idea Juris Scotici:

OR, A

SUMMARY VIEW

OF THE

LAWS

OF

SCOTLAND.

By JAMES INNES of *Symonds-Inn*, Gent.

Jura damus collecta brevi Romana libello. Cæsius.

Non fumum ex fulgore sed ex fumo dare lucem;
——Quum plurima nitent in Carmine,
Non egō paucis offendor maculis. —— Horat.

In the SAVOY:

Printed by E. and R. NUTT and R. GOSLING, (Assigns of *Edw. Sayer*, Esq;) for R. GOSLING at the *Crown* and *Mitre* against *Fetter-Lane* in *Fleet-street*. 1733.

FH
MVSEVM
BRITANNICVM

To the RIGHT HONOURABLE

John Marquiſs and Earl of *Tweedale*,

Viſcount *Peebles*, Lord *Locherrit* and *Teſter*;

One of the four extraordinary Lords of Council and Seſſion, and Heretable Bailiff of Dunfermling.

MY LORD,

HAVING written a ſmall *legal Treatiſe*, intituled *Idea Juris Scotici*, or, *a Summary View of the Laws of* Scotland; it ſeems almoſt unneceſſary to mention my Reaſons for dedicating it to your Lordſhip, becauſe it's plain and obvious to every Body, *That an extraordinary Senator in our College of Juſtice*, muſt be an extraordinary good Judge of ſuch a Performance.

And therefore the Dedication of this Piece to your Lordſhip is no leſs natural upon my Part, than it is for Men to lay their Caſes before the ableſt Lawyers, and to think themſelves always

ſafeſt when in the Hands of the beſt and moſt competent Judges.

Et quod ab ingenio Domini ſperare nequibat
Debebit genio forſitan ille tuo. (Buch.)

It is common (my Lord) for ſuch as write Dedications to dilate *upon the Antiquity or Dignity of the Deſcent of their Patrons*; and indeed were I not ſenſible that your Lordſhip would excuſe any Fault more eaſily than that of Flattery, and that great Modeſty doth induce ſome to believe that what is merely Juſtice to Merit, is nothing elſe but a paraſitical Sort of Adulation; I ſay, were I not aware of theſe Things, I could here expatiate very largely upon that Subject:

For it is well known that your Lordſhip has derived your Blood from a noble and ancient Family, which has ſubſiſted upwards of 568 Years, and hitherto remains as diſtinguiſhable for its *Dignity*, as it is for its very *Notable Antiquity*.

For as our Authors *upon Heraldry* affirm, that your Lordſhip is deſcended from one *John de Haya of* Locherrit, who lived in the Time of *William* King of *Scots* (for his Magnanimity ſurnamed the *Lyon*) and who begun his Reign *An-*

no Chriſti 1165; ſo it's likewiſe clear from our Hiſtories, that beſides the Honours *inheritable by Deſcent*, your Lordſhip's Anceſtors have been likewiſe graced with the higheſt Offices and Employments of the State.

And thus the great Truſts of being one of the *Commiſſioners of the Treaſury, one of the extraordinary Lords of the Seſſion, one of the Privy Council, as well as the eminent Offices of Embaſſador, and Lord High Chancellor of* Scotland, appear ſeverally and in different Reigns, to have been very ſafely repoſed in the Perſons of your Anceſtors, who, I think, (*without the leaſt Adulation*) may be juſtly ſuppoſed to have enjoyed them as the Returns of their great Abilities, and moſt ſincere Loyalty.

And this alſo puts me in Mind, that ſome of your Lordſhip's *Progenitors* were likewiſe, oftener than once, *Hoſtages* for the *Ranſomes* of our Kings: And I here take Notice of that Matter, becauſe it ſeems to be no leſs honourable than any thing that has been already mentioned; for it's more generous to ſhare in the *Adverſity*, than to participate of the *Proſperity* of a Prince, it being almoſt as noble to *ſupport*, as it is *to wear a Crown*.

But here it's indeed remarkable, that the more noble and excellent *Progenitors* have been,

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the greater and more generous Things are upon that Account expected from their *Repreſentatives*; and poſſibly it might been ſome ſuch Manner of thinking, that firſt excited your Lordſhip to the moſt laborious Study of the *Civil Laws*.

And when it's conſidered, that the *Civil Law* is generally juſt, wiſe, rational, and expedient in all its Principles, and by Conſequence both uſeful and neceſſary, not only in the *ſupreme Senate of* Great Britain, but alſo in the more general and important Affairs of *Europe*, one may ſafely conclude that your Lordſhip has judged the Matter rightly, and that an exact Knowledge of the *Civil Law*, doth amount to a very eminent Qualification in any illuſtrious Perſonage.

For it's certain, that the *Civil Law of the Romans*, affords ſtronger Ideas concerning the *Common Law of the World*, than do the Municipal Laws of any other particular Nation.

And as an Inſtance of this, it's plain that the *Point of Right*, with Regard to the *Imperial Pragmatick Sanction*, falls legally to be diſcuſſed upon the Principles of the *Civil* and *Feudal Laws*; and your Knowledge of both theſe is ſo well known in *England*, as well as in *Scotland*, that its unneceſſary for me to dilate

dilate upon it; and therefore I ſhall only add that what is ſo requiſite in the *General Concerns of Europe*, may *one Day* render your Lordſhip, not only uſeful, but even neceſſary for the greateſt Services, or moſt Important and Solemn Embaſſies of the King and your Country.

In fine, My Lord, as you very plainly ſee that (contrary to the common Manner of writing Dedications) I have hitherto taken Care not to inſiſt upon any Thing *but what either carries its own Evidence in its Boſom, or, elſe conſiſts in ſome Fact that is notorious and well known to be true:* So I ſhall conclude, *retaining ſtill a due Regard for that Rule*, by obſerving, That where a Perſon of good Figure and Addreſs, deſcended of a Noble and Generous Race, appears in the World ſufficiently inſtructed in its Laws, adorned with the various Advantages of a Polite Education, and at the ſame Time attended with thoſe Natural Indowments, Perſonal Qualifications, and Moral Virtues, which do truly conſtitute the *Fine Gentleman*; in him ſuch a *Conſtellation of Virtues* doth ordinarily prognoſticate an eaſy Paſſage to future Greatneſs; and can hardly miſs to make *Him* acceptable to his Sovereign, loved by his Friends, eſteemed

ſteemed by his Country, and honoured by Poſterity: And therefore that theſe may produce the ſame Effects on your Lordſhip is hoped and moſt ſincerely wiſhed for, by

My Lord,

Your Lordſhip's

moſt Obedient,

and moſt Devoted

Humble Servant,

JAMES INNES.

Cur? Quia, Mæcenas, Lydorum quicquid Etruſcos
Incoluit fines, Nemo generoſior eſt te. Horat.

THE

THE

PREFACE.

THE following Sheets were at first only composed (tho' they are now publiſhed for a more general Uſe) *at the Requeſt, and for the Benefit of a young Gentleman, who after ſtudying the* Engliſh *Law, ſeemed reſolved to travel Abroad; and certainly ſuch as do go Abroad in Order to ſee and obſerve the Cuſtoms and Conſtitutions of foreign Countries, ought firſt thoroughly to underſtand the Laws of their own, that ſo they may be enabled to give the ſame, or the like Satisfaction* to, *which they, for their Parts do expect* from others; *and without Doubt, it is to be expected that* Britiſh Subjects *ought to underſtand the Conſtitution of* North, *as well as of* South Britain.

And a thorough Knowledge of the Engliſh Law *makes this very eaſy, for tho' Terms and Forms differ; yet the Great Principles of Equity and Juſtice are the ſame in all Nations: And therefore the Laws of the* Southern *are not the worſe underſtood, for one's being pretty well verſed in the Laws of the* Northern Part *of this Iſland; for it's the Collation and Obſervation of the Conſtitutions of other Countries, that makes a Perſon thoroughly Maſter of the Laws of his own.*

Altho' a long Preface to a ſmall Performance is certainly a Thing inept, and indeed appears to be as rediculous and diſproportional as a large Veſtible, *or grand Porch, would be to a lowly*

Hutt, *or to any inconſiderable Cottage; yet Prefaces are ſometimes neceſſary, as well for* ſhowing the Deſign of the Writer, *as for* pointing out the Scope and Contents of the Paper that is wrote; and in ſuch Caſes, Prefaces are like Avenues, *ſtruck out for ſhowing Strangers the plain and eaſieſt Way to the Place of their Entertainment.*

To what has been related concerning the original Cauſe or Deſign of writing the ſaid Sheets, nothing needs be here added, ſave that the ſame were no Ways intended for making an oſtentive Show of Wiſdom, or yet for diſplaying any faſtuous or pompous Kind of Learning; *for it has been often ſeen, that Perſons in good Eſteem for Wiſdom have entirely loſt themſelves in their Writings; and yet upon an exact Survey of ſuch Writings, they might poſſibly ſtand the Teſt as well,* if not better, *than others that had been more favourably received. And again, a Book is* either well done or not; *if the* former, *the Author is expoſed to Envy; and if the* latter, *he becomes the paſſive Object of an ill-natured Redicule.*¶

And conſequently it muſt argue a ſincere Intention of doing good, and a true Regard for Society, not only to run ſuch Hazards, *but alſo to beſtow the neceſſary Time and Pains that ſuch a Performance (ſmall that it be) doth require, and that entirely for the Benefit and Information of other Men.*

But next, as to the Paper it ſelf, the very Title (Idea Juris Scotici, &c.) *is a ſhort* Index *of its Contents; the Subject conſiſts in three Words,* viz. Perſons, Rights, *and* Actions; *and the Laws of any Nation may be properly wrote upon the ſame Theme.*

As the three Particulars of this Subject are of an univerſal or extenſive Nature; ſo there are three Things proceeding from them, which are of the like extenſive or univerſal Concern; and theſe are Criminal Trials, Bills of Exchange, and all the Matter of Jus Sanguinis, or the Right of Succeſſion or Deſcent.

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The Forms in Criminal Caſes do conſtitute a very material Part of the Criminal Law; and if theſe were left looſe, ambulatory, or uncertain, the Lives of the Leiges would be thereby rendered entirely precarious; and therefore theſe and no other Forms are, *or needed to be by me mentioned; for naked, bare, or arid Forms, are not productive of* Ideas; *they afford Work for the* Memory *or* Obſervation; *but none at all for the* Fancy, Judgment, *or* Ratiocination; *and what induced me the more to labour theſe and no other Forms was, that the Forms followed in Criminal Caſes, are not every where ſo exact, as thoſe uſed in* Scotland.

But Criminal Trials, Bills, *and* Succeſſion (a), *being in every Nation of the ſame, or at leaſt of the like Import; it was thought expedient to open the Nature of them, and to expatiate more fully upon theſe Particulars, than upon the other Things treated of: Yet as* FELTHAM *obſerves*, eſt tempus quando nihil, eſt tempus quando aliquid, nullum autem tempus quo omnia dicenda ſunt.

As to the general Scope or Deſign of the Paper itſelf, it has been therein all along endeavoured to open to the Reader ſuch a Scene of the Scotch, *and by Conſequence of the* Civil Law, *as might enable him, by the Help of his own Reflections to underſtand as much of* both, *as is neceſſary to be known by any Gentleman who is not himſelf a* Practicean, *or even as a Counſel is bound to know of the Laws of any Nation, excepting theſe of his own Country, in which he ought to be more accurate, or more particularly verſant than he is bound to be in other Laws; for (ſays the Law)* turpe eſt Patricio nobili, & leges oranti, Jus illud in quo ipſe verſatur ignorare.

(a) Deſcent.

And here it is noticeable, that tho' the Scots *have many Acts of Parliament, declaring that they are not to be governed by any Foreign Laws, yet the Civil Law is truly theirs by* Adoption, *and therefore as a Man cannot thoroughly underſtand* Latin *without a general Knowledge of the* Greek, *ſo neither will he be altogether Maſter of the* Scotch, *without acquiring a tolerable clear Idea of the* Civil Law.

I ſhun'd, or evited all improper Scoticiſms, *chooſing rather to expreſs Things in the more elegant* Terms of the Civil Law, *the* latter *being as apt, and more univerſally known than the former.*

The occurring Terms of Law, are reſpectively explained at the Foot of every Page; but the Reader is not troubled with many Quotations, it being thought more neceſſary to point out the true Principles of Law, upon which the Matter or Matters treated of ſeemed to proceed; leaving him to judge of the Rationale *of the Principles, and of the Fairneſs or Solidity of the Concluſions drawn therefrom, as he ſhould think reaſonable.*

Sir GEORGE MEKENZIE *of* Roſehaugh, *having wrote the* Inſtitutions of the Laws of Scotland, *by building one Principle upon another, after the ſame Manner that the admired* EUCLID *had of old written his* Mathematical Elements; *it's now almoſt as hard to write well upon the* Scotch *Law, without touching ſomething leſs or more, that hath been formerly noticed by the ingenious Sir* GEORGE MEKENZIE, *as it would be for a Perſon rightly to demonſtrate a mathematical Propoſition, without uſing or knowing any Thing about the Elements of* EUCLID.

And therefore, altho' I uſe few Quotations, becauſe the Brevity and Scope of the Paper did regularly admit of none; yet I am

far from concealing that I have taken, what I look'd upon as the neceſſary Aſſiſtances from all the proper Authors: And I here once for all plainly acknowledge, that next to the Books of the Civil Law, the Writings of Sir GEORGE MEKENZIE *have been principally followed by me.*

And altho' in ſome Caſes, I have uſed the Writings of that great Man as a Grammar, *yet at the Time of writing the following Paper, I had really no Acceſs to his Books, nor were they (to my Knowledge) nearer to me than* Edinburgh *is to* London (b)*: Nor is there any Paradox in this Affirmation; for People know what the Bible contains, and Texts of it are often uſed, altho' the* Bible *it ſelf is not always at Hand: And certainly I could tranſlate this Preface into* Latin, *in fewer Hours than the Compoſition of the following Paper took Weeks, and that without turning a Page of the Grammars of either* Diſputer *or* Lilly, *or ſo much as opening any other Grammar upon that Subject; altho' indeed the right Performance of that* eaſy Task, *would be altogether impracticable if ſuch* Grammar *or* Grammars *had not been formerly conſidered, and tolerably well underſtood.*

Altho' Sir GEORGE MEKENZIE *wrote well, yet that does not prove that other* Scotch *Lawyers might not have done the ſame, and therefore I had no Occaſion to depend intirely upon Sir* GEORGE's Writings, *becauſe really there are few valuable Books extant upon the* Scotch *Law, which I have not ſeen; and ſince I have ſaid ſo far, I will alſo, for ſatisfying the Reader's Curioſity, briefly ſuggeſt, what from the Reading of theſe Books occurred to me concerning the moſt eminent Authors of them.*

And to begin with Mr. THOMAS CRAIG of Riccartoun, *he (according to the Manner of writing in his Days) is*

(b) Being left at *Edinburgh*, they remained there for a long Time after I had ſettled at *London*.

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ſomewhat prolix, but writes Latin *elegantly, and his* Jus feudale *doth ſhow that he has truly been a very great Scholar in his Time.*

My Lord STAIR *wrote very well and uſefully; but many Things treated of in his Inſtitutions, and which ſwell them to a Volume, are entirely altered ſince his Time; ſo that another Edition of that Book is very much wanted; and a certain well experienced Judge, being a Relation of its Author, and juſtly eſteemed an Oracle of Law, ſeems to be the fitteſt Perſon for ſuch a Work, and if not by him, there is little Probability that Lord* STAIR's *ſaid Book will be tranſcended or outdone by any of the preſent Age, unleſs that comes to paſs by a new Edition of it ſelf.*

Sir JOHN NISBET of Dirleton *wrote like a Gentleman, and one poſſeſſed of a clever Thought, and a vaſt deal of curious Learning; his Writings ſhow that he could* ſolve, *as well as* ſtart *Queſtions.*

However Sir JOHN's Doubts and Queſtions *in Law, were anſwered by Sir* JAMES STEWART (*Lord Advocate to King* WILLIAM) *with Abundance of Sagacity, Subtilty, and Judgment.*

But the Learned Sir GEORGE MEKENZIE *appears to have greatly illuminated the* Scotch *Law by his writings; for he wrote* Briefly, Uſefully, Smoothly, Naturally, and almoſt with an inimitable Force of Imagination.

However, I have uſed theſe *and all other Authors only as Mariners* do Lights at Sea, in Order to ſail clear of Rocks, *but not ſo as to throw by their Compaſſes, break of their Reckoning, or yet to miſtruſt or vilify their Art of Navigation; or as* Mile-Poſts,

or erected Piles of Wood *are uſed by Land, or upon the High-Ways,* to wit, *for pointing out the* Roads; *but not ſo as to be carried along with the Travellers: In fine, I hope the Paper it ſelf will ſhow, that I have chooſed* Common Senſe *as my chief* Directrix, *and that I have lean'd more to her Conduct, than to any of the above-mentioned Books, Doctors or Authors.*

Now if before going further it ſhould be here asked wherein the chief Beauties *of the* Scotch *Law doth conſiſt? It might be anſwered that ſome of them are to be ſeen in the* Law of Death-Bed; *by which Perſons are reſtrained from doing any Thing to the Prejudice of their Heirs at Law, within ſixty Days before their Death; ſo that the Right of Blood (or legal Succeſſion) is thereby ſecured againſt the Importunities of* Clergymen, Sighing Siſters, Wives, or Friends, as well as againſt the Weakneſs and Indifference *of Mankind at their dying Hours.*

2dly, *In their* Publick Regiſters, *from whence may be known what Incumbrances or Mortgages do affect all, or any Part of the Lands of* Scotland; *ſo that all Purchaſers may be abſolutely ſecured, becauſe they are not bound to notice any Mortgages or other Incumbrances that are not entred into thoſe Regiſters.*

And 3dly, *In the* Order of Procedure preſcribed for criminal Trials, *as will fully appear from the Paper it ſelf, to which this Preface doth relate; and therefore I need only here add, that if any* Nuſances *are committed, or if the Leiges are at any Time baulked of Juſtice with Regard to their* Lives, Liberties, Rights and Properties, *ſuch Abuſes, or Diſappointments are rather referable to other Cauſes than to any real Defect or Imperfections that are to be found in the* Scottiſh *Laws: And altho' the* Jewiſh Laws *were, in the Days of* David, *the beſt Laws in the World, as being* purely divine, *and conſequently blameleſs; and tho' that* upright King *found no Fault in the Laws themſelves, yet he ſeems to have obſerved*

ved ſome Failures as to the Application of them, as doth appear from his Expoſtulations with the Judges and Members of the Jewiſh Sanhedrin; do ye indeed ſpeak Righteouſneſs, O Congregation? Do ye Judge uprightly, O ye Sons of Men (*c*). *And from thence can be inferred, that the beſt of Laws may be miſapplied, and yet ſuch Miſapplications are not to be conſidered as any real or intrinſick Failures in the Laws themſelves.*

But at length to conclude this Preface; as the following Treatiſe doth contain many of the Engliſh *Law-Terms, and likewiſe ſundry Hints touching ſeveral of the niceſt, and perhaps concerning ſome of the moſt uſeful Points of the* Engliſh *Law; it is therefore to be hoped that the ſame will be the more acceptable* to, *and the more kindly received* by *my own Countrymen upon that Account.*

And again, as the Matter of ſaid Treatiſe is wholly new in England, *the Manner of it being likewiſe ſo in* Scotland, *no Body having hitherto trimmed up the* Scotch *Law into an* Engliſh *Dreſs, ſo as to make the ſame intelligible to the* Engliſh *Nation, it's therefore to be thought and wiſhed, that ſaid Treatiſe may be received by the* Engliſh *with the like Favour and Benevolence, as was in the Intendment of its Author towards them, when the following Sheets were publiſhed for their Service.*

And indeed that Favour might be put up with, altho' it were to be continued only until ſuch Time as a clear and true Idea of the four Objects of the Engliſh *Law,* (viz. Perſons, Eſtates, Crimes, and Courts) *ſhall be fairly given, digeſted, publiſhed and compriſed within the like narrow Compaſs; but that,* it is to be doubted, *would be a ſecond Work, and a Task great enough for* Juſtinian *and his admired* Tribonianus, Theophilus, *and* Dorotheus, *and the reſt of his illuſtrious and renowned Jurisprudents: And tho' they,* even they, *were to try their Hands upon it; yet as the* Engliſh *Law ſtands at preſent, it's ten to one, if they did not leave it in the ſame Condition in which they have left the* Civil Law, *as to which Diſorder and Voluminouſneſs are its greateſt Blemiſhes.*

(*c*) Pſalm 58.

Idea

Idea Juris SCOTICI:

OR, A

SUMMARY VIEW

OF THE

Laws of *SCOTLAND.*

PART I.

THE *Romans* having ſtudied with great Exactneſs the Principles of Equity and Juſtice; and their Armies throughout *Europe*, having been almoſt every where Victorious, it is Natural to think, where their Armies prevailed, That there, their Laws were alſo followed.

At the ſame Time its certain, That as the *Roman-Law* (purely for its Excellency) was by the wiſeſt Nations generally much reſpected; ſo to this Day, it has great Influence in *Scotland*, except where the peculiar Laws, and Cuſtoms of that Country have receded from it:

And by *it* the *Science of Law*, called *Jurisprudence*, is deſcribed to be the Knowledge of Things Divine and Humane, the accurate or exquiſite Skill of diſcerning *Right* and *Wrong*, or of diſtinguiſhing *Juſtice* from its *Contrary*; for ſays *Juſtinian*, *Juris prudentia eſt Divinarum atq; humanarum rerum Notitia, Juſti atq; injuſti Scientia:*

And by the ſame *Roman*, or *Civil Law*, *Juſtice* is defined to be a conſtant and perpetual Will and Inclination to give to every Man what is due to him, *Conſtans et perpetua Voluntas ſuum cuiq; tribuendi.*

Now the *Scotch-Law*, is a Science which teacheth how to do *Juſtice.*

As the Civilians *Objecta Juris* are *Perſonæ res, & Actiones*; ſo Perſons, Rights, and Actions are the ſubject Matter of the *Scots-Law*, and of the following Sheets.

The chief Perſons of whom the Law treats are *Judges*; and that they, and their Offices, may be the better deſcribed and underſtood, its fit to premiſe a few Things concerning Laws in general, about which theſe Judges are Verſant.

And as a clear Idea of the Common Law of the World, is the moſt ſolid Foundation for rightly underſtanding the Municipal Laws of any particular Nation, ſo in this Preamble, Law ſhall be only glanced at, in itslargeſt Acceptation, *and as the ſame is divided into the Law of Nature, Law of Nations, Civil or Municipal Laws.*

The Law of Nature is that which a Man finds grafted in his own Heart, and is *obeyed without farther Diſquiſition*; its ſaid to comprehend thoſe Principles (or rather innate Inſtincts) which are *common to Men, with the inferior Animals, as Self-defence; the Care and Tuition of their own Brood or Produce.*

The Laws of Nations are the ſoundeſt and moſt approved Deductions of right Reaſon, and are Conſequently peculiar to the rational Creation; they are thoſe Laws *quæ apud omnes Gentes peræque Obſervantur*; being the ſame Thing to Soveraigns and Independent States, that Municipal Laws are to Subjects and their reſpective particular Countries.

And this *Law of Nations is commonly divided into* the *Primary and Secondary Law of Nature.* The one flows *from the firſt and pureſt Principles* of right Reaſon; *as Reverence to the Supream Being*, as being of Himſelf the Efficient Cauſe, and Univerſal Soul of the whole Creation.

The other is deduced by way of Inference from *thoſe firſt Principles*, and comprehends the *Neceſſity of declaring a War, before the* War *can be lawful*; *the* Allowing *Reprizals*; the *Security of Ambaſſadors*, and the like.

The Civil, or Municipal Laws are the peculiar Laws and Cuſtoms of any particular Nation.

The Municipal Law of *Scotland* is either written or unwritten.

The former comprehends the Statutes and Acts of *Sederunt.* (*a*)

(*a*) *i. e.* Orders or Regulations made by the Lords of Seſſion ſitting in Judgment.

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The latter conſiſts of the ancient Cuſtoms and Deciſions, or Judgments of the fifteen Lords of Seſſion.

Statutes regulate future Caſes; but Declaratory Laws may retroſpect, theſe declaring what formerly was Law.

All Sanguinary Penal Statutes, and Correctory Laws (*b*), are ſtrictly to be underſtood; *but Acts of Oblivion*, and Favourable Laws *ſhould be moſt benignly* interpreted.

Fundamental Laws are ſo termed as being the Foundation or Baſis of a Conſtitution; and Laws purely and truly Fundamental, can never be altered: As for Inſtance, if it were endeavoured to alienate the Half of the Iſland; or to enſlave the whole to the *Grand Seignior*; or to exclude, or ſet aſide any of the Eſtates of Parliament, all ſuch Endeavours would be void and ineffectual, as being contrary to the Fundamental Laws of the Kingdom.

It is the Nature of Laws to Command and not Perſwade, *Legis eſt Jubere et non perſuadere*; and in the Interpretation of Laws, Abſurdities ſhould be avoided; but the Analogy of the Common Law, and the Intention of the Legiſlator ought to be always very much regarded.

Mean Time its plain, that the Diſcretion and Honeſty of the Judge, muſt be very much truſted, both in the Interpretation and Application of Laws; and therefore who theſe Judges are that are veſted with this Eminent Truſt, ſhall be mentioned in the next Place.

JUDGES.

THE Kings (*c*) of *Scotland* were of Old Sovereign Judges of the Realm, and actually rode to their Juſtice *Eyres* (*d*) as Judges of Aſſize in *England*, and Lords of *Circuit* in *Scotland*, do to this very Day.

Some Lawyers ſay that all Juriſdiction flowed originally from the Sovereign, which is *no ways Diſconſonant to the received Opinion of a King's being the Father of his Country*; for a Father derives no Authority from his own Children.

(*b*) Which abrogate former Laws. (*c*) King. (*d*) From *Erre, i. e. Iter*, Courts *Itinerant.*

And this Common Sentiment proceeds upon the *Patriarchal Scheme* in the *Jewiſh* (*e*), the *Jus Protimeſeos* (*f*) in the *Feudall*, and *the Patria Poteſtas* mentioned in the *Roman Law*, *where it is likewiſe ſaid*, that *Imperator erat Solus legum Conditor*; and thence it followeth, that no Judge can judge the Sovereign, becauſe no Judge can ſit by Vertue of any other Authority than his own.

Ordinary Judges are not the King's Equals; and tho' they were, yet *Par in Parem non habet Imperium*; nor *can they* be his Superiors, for the King being *Supream*, that which is Supream can have no Superior.

When the King dies, all the Power of the ordinary Judges falls and becomes Extinct; for Juriſdiction being of the Nature of a Mandate, it dies with the Granter: *Mortuo Mandatore prerimitur Mandatum.*

When his Majeſty confers a Juriſdiction either for Life, or *Durante bene placito*, the perſonal Qualifications of that Judge are preſumed to be mainly regarded in his Commiſſion; but when Juriſdiction is given *heretably*, or to a Man and his Heirs, the Soveraign is there preſumed to repoſe a ſpecial Truſt and Confidence in ſuch a Man and his Linage; and thence it proceeds, that no Judge can make a *Deputy*, (unleſs that Power be expreſsly granted by his Commiſſion) and this is likewiſe moſt Conſonant to the Civil-Law, by which *Poteſtas Gladii Delegari non potuit.*

The *Scotch* Parliaments conſiſted of Three Eſtates, *viz.* Biſhops, Barons and Burgeſſes (*g*), and of Old, both Abbots and Priors had their Seats in Parliament.

The 2d Eſtate comprehended the Nobility; and both they and the Biſhops did ſit in Vertue of the King's Creation, as the *Burghs* were repreſented in Vertue of his *Erection* (*h*), and the other *Barons* were intituled to Sit by holding their Lands of the Crown *in Capite.*

The King called and diſſolved his Parliaments at Pleaſure, and had a Negative Voice over them: But now the *Scotch* Parliaments are united to the *Engliſh*, and conſequently the Legiſlative and Architectonick

(*e*) *Abraham* led out to War and acted as King, and Nations more Numerous than either the *Scots* or *Engliſh*, were called the Children of *Iſrael*. (*f*) Right of *Primogeniture*. The Feudal Law required *ut Vaſſali Domino regi reverentiam & fidem tanquam Parenti, in omnibus dictis et factis exhiberent.* (*g*) Repreſentatives of Burghs Royal. (*h*) Conſtituting them Royal Burghs.

Power of making Laws, ſeems to be *now* ſtated in the King and Parliament of *Great Britain*: The Explication of which doth more properly appertain to the *Engliſh*, than to the *Scotch-Laws*, and conſequently is not the Subject of this Paper; and therefore, leaving both King and Parliament, I next proceed to mention the other *Scotch* Judges and Judicatures.

And theſe are the Lords of Council and Seſſion; the Commiſſioners of Juſticiary, Conſtables, and Barons of *Exchequer*; the Principality; the Lord High Admiral, and Commiſſaries of *Edenburgh*; inferior Admirals and Commiſſaries, Sheriffs, Stewards, Lords of Regality, Magiſtrates of Burghs-Royal, Barons, and Juſtices of the Peace.

The Lords of Seſſion (*i*) having been at firſt a *Court Ambulatory* or Itinerant, were afterwards modled by King *James* the Vth, (*k*) after the Manner of the Parliament of *Paris*.

And the Statute erecting them into a College of Juſtice runs upon this Narrative (*l*), *That our Soverain Lord is maiſt deſirous to have an permanent Ordour of Juſtice, for the Univerſal Weill of all his Leiges: And therefore tendes to inſtitute an College of Cunning and Wiſe Men, baith of Spiritual and Temporal Eſtate, for doing and Adminiſtration of Juſtice in all Civil Actions*, &c. Now, however odd or antiquated the Expreſſions of this Narrative (*m*) may ſeem, yet it plainly ſhows, That the Lords of Seſſion were to be no more itinerant, and alſo points out wherein their Juriſdiction was to conſiſt; Namely, *in Civil Actions*.

And, tho' before the Reformation, they were made up of Seven Eccleſiaſticks, and Seven Laicks, (the Preſident (*n*) being a Churchman) yet now all the 15 are Laicks, and Nine are a *Quorum*.

Four extraordinary Lords were allowed to ſit with them to learn rather than decide, yet now they Vote, but have no Sallaries.

The Lords of Seſſion are not only the proper Judges in all Matters of Civil Right, but do alſo review the Decreets (*o*) of all inferior Judicatures.

They alſo came in Place of a Committee of Parliament, called *The Commiſſioners for Plantation of Kirks, and Valuation of Teinds*; and in this

(*i*) Court of Seſſion. (*k*) Anno 1537. (*l*) Recital. (*m*) Recital.
(*n*) Chair-man or Speaker to the Houſe. (*o*) Judgments.

Capacity

Capacity they Judge concerning Miniſters, Stipends, Tithes, Patronages, or Rights of Advowzen.

For preſerving the Honour and Dignity of this Court, the Lords are diſcharged from accepting of any pedaneous Offices, under the Pain of Deprivation; but then they have their own Commiſſions during Life, *Vel quam diu ſe bene geſſerint.*

In *Rank* and *Precedency*, next to the Sons of Earls, they are the firſt Gentlemen in *Scotland.*

And by an Act (of *James* the Vth) Intituled *The King's gud mind anent the Lords of the Seſſion*, they are exempted from the Payment of Taxes.

But tho' the *Precedency* due to the Ladies *of theſe Lords* be continued with them, even after the Demiſe of their Husbands, yet the Immunity from Taxes, being annexed to the Office of *Lord*, or *Senator*, it doth follow it, and ſo is not continued to the Relict after the Deceaſe of her Husband.

And here I muſt once for all obſerve, That the *Scots Laws* concerning Private Right, were not altered by the Treaty of Union of the Two Kingdoms of *Scotland* and *England.* And by the 19th Article of that Treaty, *The Court of Seſſion, and College of Juſtice*, is allowed the ſame Authority and Privileges that it had before the Union.

Now, as the Lords of Seſſion do conſtitute the Moſt Auguſt Court of the Nation, ſo they are ſerved by an Illuſtrious Society of Learned Civilians, called *The Faculty of Advocates*; their chief Director is called *The Dean of Faculty*, or *inclytæ facultatis Juridicæ Decanus*; they are much the ſame with the *Generoſi* mentioned in the Civil Law, and are made up of the beſt Gentry (*p*) of the Nation: They are intituled to Plead before all the Courts of the Kingdom.

The *Commiſſioners of Juſticiary are Judges of all Crimes.* Their Court is called *The Criminal Court* (*q*), and conſiſts of the (*r*) *Juſtice General*, *Juſtice Clerk*, and Five other Lords of Juſticiary.

Theſe Juſtices are Judges of all Points of Relevance (*ſ*), and of the Objections againſt Witneſſes and Aſſizers (*t*).

(*p*) Gentlemen. (*q*) Criminal Court. (*r*) Lord Chief Juſtice. (*ſ*) Demurrers. (*t*) Jurymen.

The *Perſon* accuſed before them of any *Delict* or *Crime*, is either *impriſoned*, or he *remains ſtill at* Liberty; in the former Caſe he is proceeded againſt by way of *Indictment*, and in the latter *by way of Summons*.

Indictment is ſo called from the *French* Word, *enditer deferre Nomen alicujus*, or from the Word, *dict tu*, What ſay'ſt thou? For the Perſon indicted is asked what he can Anſwer to it?

Summonds's and *Indictments* differ a little in their Stile, but nothing in Eſſentials; they are both in *Engliſh*, and of the Nature of an *Ariſtotelian* Syllogiſm, conſiſting of *Major*, *Minor*, and *Concluſion*.

The Subſumption of this Summonds, or Minor of the Syllogiſm, muſt be always clearly proved againſt the *Pannel*, for ſo the Defendant, or alledged Delinquent is called.

At his firſt entering into the Pannel-Box (*u*), the Indictment is audibly read over, and the *Pannel* is asked what he has to ſay to it? If he acknowledges the Matters ſet forth in the Indictment, then that ordinarily prevents further Trouble; and nothing remains, ſave only to pronounce Sentence againſt him: For *in Confitentem Nullæ ſunt partes Judicis*.

But if the *Pannel* either ſtand mute, or yet deny the Accuſation, there's nothing ſaid or done to him, nor is there any Manner of Severity uſed againſt him; for he being always preſumed Innocent, till the contrary appear, is allowed to manage his own Defence as he beſt can.

So that the Tria proceeds notwithſtanding his Silence, or Denial, and the Proſecutor muſt go on to aſcertain the Relevance, and to prove the Matters ſet forth in his Indictment as he can be ſerved.

And with regard to the *Relevance*, the Pannel is allowed to argue the Facts in the Indictment, ſuppoſing them to be true, without incurring the leaſt Hazard of any Suſpicion that they really are ſo.

But before the Juſtices will allow any Proof to be taken, they do firſt Cognoſce the Fairneſs, Validity and Import of the Propoſitions; that's to ſay, they ſettle or aſcertain the Conſequences of the Facts ſet forth in the Indictment; and this is called the *Determination of the Relevance*.

(*u*) A Desk where he ſtands.

But

But if the Matters of Fact be either not Relevant (*i. e.*) not Criminal, or not illative of the Concluſion or Specifick Puniſhment libelled (*x*), then the Indictment is *quaſhed*, without allowing any Probation of the Minor, or Subſumption of the Summons, for *Fruſtra probatur quod probatum non relevat.*

And therefore great Diſputes do often ariſe concerning the *Relevancy of Crimes*, and of the Circumſtances as ſet forth in the Indictment; and likewiſe concerning the manner of Proof, or *Modus probandi*, as whether the ſame ſhould be by *Write*, by *Witneſſes*, by *Preſumptions*, or by *Confeſſion.*

For it is obſervable, That ſome Crimes cannot be proved by *Write*, as *Murder*; for the *Homicide*, may refuſe his own Hand-writing.

Others can't be prov'd by Witneſſes as *Perjury*; for if Perjury were ſo probable, then the Pannel might endeavour to prove that the Witneſſes adduced againſt him were perjured. And again, the Proſecutor might endeavour to diſprove the Pannel's Witneſſes, *& e contra, atq; ſic daretur progreſſus in infinitum.*

In moſt Crimes a Man's Life is never to be taken away by Preſumptions, but *Adultery* is capitally puniſhed, (and was ſo by the *Moſaick-Law*) (*y*) and yet it can be no other ways proved.

Confeſſion is of all others reckoned the moſt convincing Probation, but yet it is diſregarded in ſome Caſes, as in *Witchcraft*, or where the ſame proceeds *ex tædio Vitæ, vel ex dolore animi.*

Nor is Confeſſion ever ſuſtained, unleſs it be judicially made, and voluntarily emitted.

For it is ſelf-evident that Confeſſions elicite through the Pannel's Simplicity, or yet extorted from him by *Torture*, *Severity*, or other open Force, can never amount to any convincing or legal Evidence.

And therefore in order to ſettle the Relevance of all theſe Points, the Advocates (*z*) *pro* and *con* are firſt allowed *Viva Voce*, to plead before the Juſtices, and in their Pleadings to uſe ſuch Turns of Expreſſion, or Eloquence, as they ſhall ſee convenient, and to deduce their Arguments from what Topicks they pleaſe, or to Plead from the Law of

(*x*) Specified in the Indictment. (*y*) Leviticus 20th. (*z*) Counſel.

God,

God, (which is the firſt Fountain of the Criminal Law) the Law of Nations, the Civil Law, or from their own Municipal Laws and Cuſtoms, as they ſhall think moſt expedient.

And afterwards, that the learned Arguments uſed in thoſe Pleadings (*a*), (which are the Produce of all that Imagination, Skill, or Education, could ſuggeſt to the Council) may be the more permanently under Conſideration of the Judges, a Day is aſſigned (*b*) for giving in Informations.

Theſe Papers, called Informations, contain a Recapitulation of the former *Pleadings*, and are nothing elſe but a clear and copious State of the whole Caſe.

They are drawn by the ableſt of the Council, and peruſed and approved of by the reſt.

The principal Informations *pro* and *con* being in Writing, are ſubſcribed by the Advocates *hinc inde*, given to the Clerk of Court (*c*), and are afterwards conſerved among the Records.

But both Judges and Jury are ſerved with exact *printed Copies* of the principal Informations, and theſe are given to the Aſſizers, that they may comprehend the Law as well as the Fact, (the one being frequently complicated with the other) and thereby perceive what Favour the Caſe merits, and likewiſe the Nature of the Evidence it requires.

After adviſing (*d*) theſe Informations, the Lords determine the *Relevancy* and their Interloquitor (*e*), being wrote out upon the Back of the principal written Information, is ſubſcribed by all the Judges: But, in other Courts, one Judge alone doth ſign the Awards, in Name of all the reſt.

If by this Interloquitor the Indictment is found Irrelevant (*f*), then the Pannel is *eo ipſo* aſſolzied, and being thus acquit, can never be tried again for the ſame Crime,

But if the Indictment be found Relevant, its remitted to the Knowledge of an *Inqueſt* or Aſſize (*g*).

(*a*) Orations. (*b*) Appointed. (*c*) Prothonotary. (*d*) Deliberating upon, or Conſidering. (*e*) A Judgment ſo called, *Quia Judex interim loquitur*. (*f*) Not relevant. (*g*) Jury; Aſſize is derived from the *French*, and ſignifies a Sitting or Seſſion.

The Aſſize conſiſts of fifteen Sworn Men, choſen by the Judges out of *Forty-five*, who are cited before them for that Purpoſe.

Theſe fifteen Aſſizers are Judges of the Proof (*h*); and if they ſhould Aſſolzie after clear Probation, or Condemn without it, yet they can't be puniſh'd for ſo doing; they being (with regard to the Proof) both Judges and Witneſſes, by the Law of *Scotland*.

Before the firſt Day of Appearance, the Pannel is timeouſly (*i*) ſerved with a Copy of the Indictment, and with a Liſt (*k*) of the Aſſizers and Witneſſes Names, and ſpecial Deſignations (*l*) who are to be adduced againſt him; that ſo he may be prepared (at the Day of Trial) to prove his Objections (*m*) againſt all or any of them; and likewiſe to bring Evidence of all his other Defences.

Facts falling under the Senſes are all that's allowed to be proved by Witneſſes, but no Emiſſion of Words, (becauſe the Import of them may be miſtaken) nor nothing merely Conjectural or *Irrelevant* is admitted to be proved by them.

Both Witneſſes and Aſſizers may be ſet aſide, or rejected upon relevant Objections (*n*): And *Malice, proditio teſtimonii*, appearing *to Depone without Citation, or Forwardneſs in Deponing, Dependence upon the Proſecutor, Contingence of Blood* (*o*), *Bribery*, &c. are all ſeparately Relevant; and no Witneſs can be received whoſe Name was not ingroſſed in the Pannel's Liſt, becauſe the Pannel not having been duly Certiorate, that ſuch a Witneſs was to be adduced, could not be prepared to aſcertain his Objections (*p*) againſt him.

In moſt Caſes Women are debarred from being Witneſſes, and ſome fancy that the Frailty of their Underſtanding has been the Reaſon of it; but its more probable that the Law only deſigned to prevent their gauding Abroad in attending Courts, or elſe that it ſuſpected the Compaſſion or Tender hearted Humour of the Fair Sex; and that they might be moved even to ſuppreſs Facts or Circumſtances, rather than to deprive the King of a Subject, their Neighbour of a Husband, and their fellow Creature of his Life, by a rigorous or hard-hearted Teſtimony.

(*h*) Evidence. (*i*) In due Time. (*k*) Catalogue. (*l*) Additions, (*m*) Challenges. (*n*) Challenges. (*o*) Relation. (*p*) Challenges.

Be that as it will, the ſame Thing that hinders Women from being Judges in other Countries, doth likewiſe Debar them from being Witneſſes in *Scotland* (*q*).

And, here it is obſervable, that many of the Objections that are Relevant (*r*) againſt Witneſſes, and Aſſizers, would be likeways ſuſtained for *Declining* (*ſ*) of the Judges, and where there are any ſuch Objections, (*as Relation*, &c.) the Juſtices do ordinarily *Decline* themſelves, without giving the *Pannel* the Trouble of moving the Court upon his *Declinatory Defences*.

However, in ſome Caſes Women are allowed to give Teſtimony, as for proving the Birth of a Child, or its being heard Cry, Women only being ordinarily preſent at Child-bearing; they are alſo allowed in other Caſes, by reaſon of the Danger of the Common-wealth, as in *Willful Fire-raiſing*, or becauſe the *Crime* can't be otherways proved, as in *Piracy*, or Hameſucken (*t*).

And yet it is generally concluded, where the Puniſhment is moſt Severe, that there the Evidence ought to be the more *certain and clear*.

The above, and all other Objections againſt Witneſſes, muſt be moved before Deponing; for if they be once allowed to Swear, ſuch is the Religious Regard paid to the Credibility of an Oath, that no Proof of Objections will be thereafter admitted.

But the Relevance being determined, and the Indictment remitted to the Knowledge of an Inqueſt, and this Inqueſt, or Aſſize, being incloſed (*u*), the Probation proceeds in the next Place, and accordingly all the Witneſſes are called upon by their reſpective Names, and ſuch as are Abſent are fined (*x*) by the Court.

But the Witneſſes preſent are ordered to attend in an outer Room, and a Guard is placed upon them, or elſe they are waited of by the Macers (*y*) of Court, that ſo they may have no Opportunity of hearing the Depoſitions of one another; and the Pannel will get any Wit-

(*q*) They were debarred by the Civil Law from Publick Offices, as being always *ſub Cura*, or under the Influence of Parents or Husbands, and the Teſtimony of one under Influence is not reckoned free; and its upon that *Ground that Domeſtick Servants* are alſo debarred from giving Teſtimony. (*r*) Which do relieve. (*ſ*) Waving. (*t*) Beating a Man in his own Houſe. (*u*) *i. e.* Choſen out of Forty-five Perſons ſworn and placed in their proper Seats. (*x*) Amerciat. (*y*) Uſhers and Cryers.

neſs rejected, if he can prove that ſuch Witneſs, after being prohibited, came into Court in order to liſten, and did actually hear what others had Depos'd againſt him.

From this outer Room they are all called upon one after another, (beginning firſt with the Purſuer's Witneſſes) and if the Pannel has any Objection againſt the Witneſs called upon, it is moved by his Counſel, and it muſt be both *Relevant*, and *inſtantly inſtructed*, or otherways the Lords will not ſuſtain it.

If the Objection be Simply ſuſtained, then the Witneſs is *ſet*, or rejected without being allow'd to Depone.

But if the Objection is either ſcrimply Relevant, (as where Minority or Leſs-age is objected) or yet ſcarcely proved, (as where it ſtands upon a ſingle Teſtimony) then the Witneſs uſes to be admitted *cum Nota*, and the Import of ſuch exceptionable Evidence, is thereby referred to the Diſcretion of the *Jury*.

But if there be no Objection made, or if the Objection moved be repelled, the Witneſs is firſt ſolemnly Sworn, and then examin'd by the Juſtices.

The uſual Oath is in theſe Words, *viz.* *As* the Witneſs, *ſhall Anſwer; to the Eternal God at the great Day of Judgment; and by his Part of Heaven, he ſhall tell the Truth, and conceal no Part of it, in ſo far as he knows, and ſhall be asked at him.*

This Oath being adminiſtrate, the preliminary Queſtions are firſt put, *viz.* What is the Deponent's Age? Whether he hath any Malice or Reſentment againſt the Pannel? Whether any Body inſtructed him to Depone, or told him what he ſhould Swear? Whether he has any Intereſt in the Proſecution, or may gain or loſe by the Cauſe? Or, whether, *fovet Conſimilem Cauſam?* Or if ever he gave any *partial Counſel* or Advice to carry on the Proſecution againſt the Pannel, *&c.?*

The Uſe of the firſt Queſtion, and others of the like Nature, is to diſcover the Witneſſeſs's Judgment; for if he knew not his own Age, he would be juſtly reckoned a very Injudicious and Weak Witneſs. And beſides, from his Age may be diſcovered how far he could know or remember the Facts referred to his Oath; and if the Deponent can't ſwear Negatively againſt the other *Preliminaries* above-mentioned, then he

he is to be no further examin'd ; for the Reaſon is obvious, why a Perſon having *Malice*, &c. againſt the Pannel ſhould neither be credited, nor yet tempted to Perjury.

The *Preliminaries* being over, the other Interrogatories are there after ſuggeſted by the Counſel, to the Judges ; and if they are *Relevant*, the Witneſs is examined upon them ; but then nothing merely Conjectural, depending upon *Hear-ſay*, or immaterial, is to be asked to the Prejudice of the Pannel.

Tho' the Pannel's Council muſt not trouble the Court with Queſtions intirely Impertinent, yet they are allowed to put as many croſs, ſurprizing, or even extraneous Interrogatories as they think Convenient, and the Judges ſhall find Neceſſary for the expiſcation of the Truth.

But as nothing leſs than the concurring Teſtimonies of two Habile Witneſſes, concurring and clearly agreeing upon the ſame individual Facts and Circumſtances, doth come up to a plenary Probation, or full legal Evidence, which is ſuitable to the judicial Law of *Moſes*, where it is expreſsly determined, *Deuteronomy* the 19th, *That one Witneſs ſhall not riſe up againſt a Man for any Iniquity, but at the Mouth of two or three Witneſſes, ſhall the Matter be eſtabliſhed :* So it is obvious, (the Witneſſes being always examined, without the Preſence of one another) that the Security of the Pannel muſt, in a great Meaſure, depend upon theſe extraneous Interrogatories.

An eminent Inſtance of this is to be ſeen in the famous *Hiſtory of Suſanna* (z), who being condemned upon the falſe, tho' unſuſpected Teſtimonies of the Two *crafty Elders*, a young Man is ſaid to have cried out with a loud Voice, *Are ye ſuch Fools, ye Sons of* Iſrael, *that without Examination, or Knowledge of the Truth, ye have condemned a Daughter of* Iſrael ?

Upon this the Two Elders were examined ſeparately, and upon extrinſick Interrogatories, and were thereby intirely diſconcerted in their Meaſures ; for the one declared that *Saſanna* had proſtitute herſelf under a *Maſtick*, and the other, that ſhe had done it under a *Holm-tree* ;

(z) Apocrypha.

by

by which Diſcrepance the Falſity of the Teſtimonies clearly appeared, and the Innocent *Suſanna* was thereupon juſtly acquitted.

And therefore ſince Oaths were never leſs Sacred than in the preſent Age, ſince daily Experience ſhows, that Hundreds may be tempted to *Perjury* thorough Ambition, Intereſt, or Revenge; and that even the very Judges and Elders of *Iſrael*, (whoſe Teſtimonies were leſs ſuſpicious than the Oaths of ordinary Perſons are now a-days) were found guilty of this Crime, its thence Conſequential, that the Law of *Scotland* is no ways unreaſonable, in being Cautious as to the ſhedding of Blood, and in ſecuring the Lives and Fortunes of the Leiges, by not leaning too much to Oaths, and ſingle Teſtimonies; and that it is thereby rationally provided, that the concurring Teſtimonies of Habile (*a*) Witneſſes ſeparately examined, and agreeing upon all extraneous Circumſtances, ſhould be neceſſary in order to the Condemnation of any of the Leiges: For, ſays the Law, its more Eligible that a hundred Delinquents ſhould eſcape, then that one innocent Perſon ſhould be *Murdered*, or (which is all one) *unjuſtly condemned to Dye.*

It being thus clear that the Witneſſes ought to be unxeceptionable, ſeparately examined, and concurring, it is in the next Place obſervable,

That what is ſwore to, is not truſted to the ſhort, brief, or imperfect Notes of one ſingle Judge, who may be ſometimes fatigued by the Prolixity of a tedious Trial; nor is it left to the ſuperficial, and incoherent Notations of a clowniſh, ruſtick, or illiterate Juryman; but the Interrogatories being ſuggeſted by the Counſel to the Judges, the Witneſſes are by them reciprocally examined, and their Oaths are openly, fairly, and deliberately dictated by the Juſtices, *to*, and correctly wrote out by the Clerks of the Court.

And the Depoſitions ſo drawn out are publickly read over in open Court; and if any thing Material appears to be either intirely omitted, or yet unclearly expreſſed, the ſame will be immediately added, or corrected upon the leaſt reaſonable Suggeſtion of the Counſel, the Witneſs, or even of the *Pannel* himſelf.

But if the Depoſition be dictated, and wrote out to the Satisfaction of all Parties concerned, (which always it is, and muſt be) then the

(*a*) Unexceptionable.

Deponent

Deponent is asked his *Cauſa Scientiæ*, and that being declared, the Oath is cloſed, and duly Subſcribed by the Witneſs and by the Juſtices, if the Witneſs can write; and by the Judges alone, if he Depone that he cannot Write.

The Depoſitions thus wrote out, and ſubſcribed, are properly the only ſubject Matter of the Aſſizers Cognition: And as by hearing the Witneſſes *Viva Voce* examined, they have a fair Opportunity of penetrating into the Paſſions of their Mind, and thereby diſcovering whether the Deponent be acted by Ambition, Intereſt, or Revenge, or whether there be a genuine Air of Truth accompanying his Teſtimony; ſo by having all the written Depoſitions permanently under their Conſideration, they may, without Difficulty, find out what is proved and what is not, and can likewiſe more eaſily diſcern the Contradictiouſneſs of the Oaths, the Defects of the Proof, and in every Thing proceed with more Certainty, than otherways poſſibly they cou'd do, by committing the tranſient and ambiguous Expreſſions of Numbers of Witneſſes, to their own imperfect Notes, or lubricious Memories.

And that nothing may be wanting to render the Aſſizers inexcuſable in Caſe they ſhould Err, the Avocates *pro* and *con* are allowed to Charge the Jury, make their Obſervations on the Proof, point out the Defects; and in what View the Evidence is to be taken, and to direct the Jury as to the Method and Nicety of ſcrutinizing the Probation; but here the Pannel's Counſel has the uſeful Privilege of being always the laſt Speaker.

After exact Peruſal, arguing upon, and ſerious Conſideration of the Premiſſes, the Queſtion *Proved, or Not*, is put by the Chancellor of the Aſſize (*b*), and carried by Plurality of Voices; and the *Verdict*, whether Affirmative or Negative being ſeal'd up, is on the firſt Court-Day preſented to the Juſtices ſitting in Judgment.

At which Time the Verdict is opened, and if the Facts are found proven (*c*), the Juſtices proceed to Pronounce *Sentence* or *Doom* againſt the Criminal; *& vice verſa*, if the Thing be not proved, the Judges muſt inſtantly Aſſolzie the Pannel (*d*), and diſmiſs him from the Bar.

(*b*) Foreman of the Jury. (*c*) Proved. (*d*) The Perſon accuſed.

And

And here it is obſervable, that there is no ſuch Thing as *Motions in Arreſt of Judgment*, that ſeemingly tending to render Judges Arbitrary, or at leaſt indirectly to veſt them with a Power of remitting Crimes; whereas ſuch a Power doth only properly appertain to the Royal Prerogative.

Nor can the Judges order or compel the Aſſizers to reincloſe, or reconſider their Verdict, that being contrary to the *Claim* (*e*) *of Right*; nor can the Aſſizers alter it, there being a *Jus quæſitum* to the *Pannel* from the Moment that the Verdict is ſigned; and this Verdict is ſo called, *quaſi vere dictum*, and indeed *præſumptione Juris & de Jure pro veritate habetur*.

Having thus related how *Pannels* (*f*) *are arraigned, accuſed, tryed, aſſolzied, or condemned*: I ſhall now leave that Subject, having already dwelt longer upon it, than the Scope of this Paper doth regularly permit; but I choſe to expatiate a little further on the *Criminal-Court*, than upon the other Judicatories, becauſe the great Concerns of Mankind, Namely, their *Lives*, *Fortunes* and *Reputations*, do too frequently depend upon it.

HIGH CONSTABLE.

THE eminent Office of *Lord High Conſtable of Scotland* hath, ſince the Reign of *Robert the Bruyſe*, which begun in the Year 1306, ſtood Heretably veſted in the Noble and Ancient Family of *Erroll*; and, as in the Year 980, the Father of that Family was honoured by *King Kenneth the 3d*, and remarkably inriched with as much Land as a *Falcon* cou'd fly over without lighting, for the famous Magnanimity of him and his two Sons, in ſtopping the Flight of the *Scots*, making them rally againſt the Enemy, and thereby delivering their Country from the *Daniſh* Slavery; ſo this Office or Dignity, ſeems likewiſe to have been originally conferred by the Sovereign, as a further Remuneration of the priſtine, eminent, and the *then* ever untainted Loyalty of that moſt Noble Family.

(*e*) Petition of Right. (*f*) Delinquents.

Conſtabularies (*g*) were only erected in Places where the Kings had their Palaces, and Conſtables took Cognition of Crimes, Treſpaſſes or Diſorders, committed within four Miles of the King's Habitation.

The Office of Conſtable had ſome Reſemblance to that of the *Comes Stabuli*, mention'd in the Civil Law; but the Powers of Conſtables varied according to the Tenor and Conceſſions in their reſpective Commiſſions, and theſe are beſt explained and aſcertained by notorious Cuſtom, uninterrupted and immemorial Poſſeſſion.

The Kings of *Scotland* were of Old neceſſitate to cauſe Caſtles to be built in divers Places of the Kingdom for preſerving the Peace, and the Governours of thoſe Caſtles were called Conſtables, (tho' as an *Engliſh* Lawyer juſtly obſerves) they ought rather to be termed *Chaſtellains*.

There are Five Barons of *Exchequer* (*h*), viz. The Lord *Chief Baron*, and *Four ordinary Barons*, and theſe are the Sovereign Judges in all Matters concerning his Majeſty's Revenue, as to which they have a *privitive Juriſdiction* (*i*).

The *Exchequer* is ſo called from the *French* Word *Exchequier*, *Tabula*, becauſe the Cloth of the Table, at which they uſed to ſit, was *Party-coloured* or *chequered*. The true *Latin Word* for it is, *Statarium*, and not *Scaccarium*.

The Procedure in this Court is much the ſame with the Proceedings in the *Exchequer* of *England*; and this is the only Court of the Nation, where Matters of Civil Right are tried or decided by the Verdict of a *Jury*, and Juries here conſiſt not of 15, but only of 12 Men, after the Manner of *England*.

All *Judgments* of Old were pronounced by Neighbours, or by Jurymen pickt out of the Neighbourhood, and thus among the *Romans* were the *Centum Viralia Judicia*: Amongſt the *Feudaliſts* were the *Pares Curiæ*, in Imitation of which laſt, the *Scots* had Originally their Juries in *Civil* as well as in *Criminal Caſes*.

But thereafter as Law was reduced to a Science, and that Matters of Property did often reſolve into intricate Points of Law, it was thence thought unreaſonable to truſt to the Simplicity of a *Jury*, the

(*g*) Conſtables. (*h*) Exchequer. (*i*) Excluſive of all others.

Diſcuſſion or Deciſion of thoſe Queſtions, which evidently puzzled the Ingine of the Learnedeſt Civilians, Doctors and Authors.

And therefore as Judges are preſumed Learned, which Juries are not, the Law has thought fit to recede from Juries in all Matters of Civil Right; (and even in Criminal Caſes they are only truſted with the Cognition of the Probation, or Matters of Fact) ſo that all Queſtions (excepting ſuch as may Occur in *Exchequer*, and a few Things that proceed upon *Brives* iſſued out of the Chancery) concerning *Dominium*, Property, or Rights, are decided by the reſpective Judges, without the Aid, Interpoſition, or Aſſiſtance of any Jury.

PRINCIPALITY.

THE Prince of *Scotland*, among his other Titles, was called Earl of *Cumberland*, whilſt that Country was ſubject to the *Scotiſh* Monarchy; and he had a Patrimony of his own, which was Erected into a Juriſdiction called the *Principality*; the Revenues of which have, ſince the Revolution, been levied by the Exchequer.

If the King had no Son, and whilſt there was no Prince exiſting, then the Vaſſals, or *free Tenants* of his Patrimony, were by Law conſtructed to hold their Lands immediately of the Crown, and were therefore of Old obliged to give Suit and Preſence in Parliament, it being (in antient Times) nothing elſe but a General Council, or the King's *Baron-Court*.

But then if there was a Prince exiſting, and Conſequently interjected betwixt ſuch Vaſſals and the Crown, it was thence Evident that they did not hold their Lands immediately of the King, and ſo could not be ſummoned to Parliament.

Yet ſtill upon the ſame Ground it proceeds, that to this Day, during the Non-exiſtence of a Prince, ſuch *free Tenants*, whoſe Lands were holden of the *Prince*, *Duke of* Rothſay, *Earl of* Cumberland, *and Steward of* Scotland (*k*), have Right to Vote in the Election of a Repreſentative in Parliament for that County where their Lands lie, pro-

(*k*) *Scotch* Titles, or Compellations for the Prince.

vided

vided that theſe Lands be of the *Extent*, *Valuation*, or *yearly Rent*, that ſhall be afterwards particularly ſpecified in the Deſcription of Barons.

ADMIRAL.

THE Lord High Admiral is Judge in all Maritime Affairs, as well in Criminal, as in Civil Caſes, if the Crimes were committed at Sea, or within Flood-Mark: And thus Piracies, and Treſpaſſes concerning wreckt Goods, are frequently tried before this Court.

Strangers and Foreigners do ordinarily purſue, and are purſued *(l)*, before the Admiralty; and it is fit to know, that not only Foreigners themſelves, but likewiſe Natives living in Foreign Countries, may be effectually purſued, in *Scotland*, ſo as to affect their Goods, Caſh, Lands, or Eſtate lying there.

And becauſe the Caſes of Strangers, and Queſtions concerning Commerce and mercatil Affairs are Cognoſcible before the Admiralty, therefore its Procedure is a little more peremptory, ſummary, and expeditious, than the Proceedings of other Courts are.

There is a ſpecial Privilege annext to the Juriſdiction of this Court, whereby the Defendant is obliged to find Caution *(m)*, not only to preſent himſelf, but likeways, for the Payment of whatever Sums of Money, or Damages may be diſcerned *(n)*, to the Plaintiff, and this is called Caution, *Judicio ſiſti, & Judicatum Solvi.*

And that the Defender *(o)* may not be *officiouſly* Neceſſitate to find ſuch Surety, the Purſuer *(p)* is not allowed to proceed in his Action, until he firſt find Caution *(q) de expenſis*, leſt he ſhould be found Litigious and ſuccumb in his Proceſs *(r)*.

COMMISSARIES.

THERE were two Archbiſhops and twelve Biſhops in *Scotland*, and every Biſhop had the Nomination of an Official or Commiſſary, within his own Diocy *(ſ)*: But the four Commiſſaries of *Edin-*

(l) Sue and are ſued. *(m)* Surety or Bail. *(n)* Awarded. *(o)* Defendant. *(p)* Plaintiff. *(q)* Surety *(r)* Action. *(ſ)* Dioceſe.

burgh (ſo called becauſe they ſit there) were appointed by the two Archbiſhops, *viz.* of *St. Andrews* and *Glaſgow*.

Theſe Commiſſaries bear ſome Reſemblance to *Doctors-Commons*; for they are *Judices Chriſtianitatis*: And of Matters of Scandal, all Teſtaments are confirmed by them, and they do ſometimes appoint Executors.

The Commiſſaries of *Edinburgh* are Judges of *Baſtardy*, and can declare Marriage Null (*t*), for *Impotency*, *Contingency of Blood*, or by Reaſon that either Party *ſtands Married*.

And it is taken for granted, that they can diſſolve Marriage for *Adultery*, or for willful (*u*) Deſertion; and after ſuch Diſſolution, the Party Innocent, is actually allowed to Marry.

But how far this is truly warrantable, may be much doubted; for Marriage being a Divine Contract, it is not eaſy to conceive how it can be diſſolved by the ſecular Magiſtrate: And I perceive, that in ſuch Caſes, the Canoniſts only meant, *Separatio Menſæ & Thori*, but *never* to diſſolve the very Bond of Marriage, *vel ipſum Matrimonii Vinculum*.

The Lord High Admiral, and Commiſſaries of *Edinburgh* may reduce (*x*) the Decreets (*y*) of all inferior Admirals, and Commiſſaries; but even their Judgments, as well as the Decrees of all the other Judges, or Judicatures, to be afterwards mentioned, are in *Civil Caſes*, (and the Commiſſaries have no Criminal Powers but only Δικην αναιμακτην, or *a bloodleſs Juriſdiction*) ſubject to the Reviews of the Lords of Council and Seſſion.

SHERIFFS.

SHERIFFS are very honourable and ancient Officers of the Crown; they are in Effect the chief Juſtices of the Peace, and they have a *Civil*, as well as *Criminal Juriſdiction*.

Alluredus in his League with *Guntherus*, King of *Denmark*, imitating the remarkable Counſel given by *Jethro* to *Moſes*, (Exod. xviii.) divided

(*t*) Void. (*u*) Obſtinate. (*x*) Reſcind or reverſe. (*y*) Decrees.

England

England into *Satrapias*, *Centurias* (*z*) *& Decurias* (*a*). The firſt he called *Shires*, *a Shire* ſignifying a *Section* or *Diviſion* of Land; ſo that the *Sheriffdoms* are Juriſdictions limited to ſuch Diviſions, and after the Example of *Alluredus*, moſt of the Shires (*b*) of *Scotland* are, or were erected into Sheriffdoms.

Theſe Juriſdictions are either granted to a Man and his Heirs for ever, or elſe to a ſingle Perſon during his own Life-Time.

In both which Caſes the Powers are the ſame; for the Civil *Juriſdiction* reacheth to all *perſonal* and *poſſeſſory* Actions (*c*); tho' *Declarators* of *Property* (*d*), and the *Competition of real Rights* (*e*), are Cognoſcible *by the Lords of Seſſion privitively*: And the Criminal Juriſdiction extendeth to all Crimes except *Treaſon*; and the four Pleas of the Crown, *viz. Murder*, *Robbery*, *Fire-raiſing*, *and Raviſhing of Woman*: Yet Sheriffs may Judge in Murder, if the *Homicide* was taken with the red Hand, that is immediately committing the *Murder*.

And here it is obſervable. 1. That the Defendant in all Crimes, and in all Courts, is always allowed Letters of Exculpation, authorizing him to adduce Witneſſes for proving his own Innocence.

2. If he be Acquit in one Court, he can never be again tried either in that, nor in any other Court for the ſame Crime on Delinquency.

And ſince the Verdict of a Jury, declaring a Man Innocent, is as much, and rather more to be credited, than any After-Verdict finding him Guilty, becauſe *Quiſq; præſumitur bonus, & ſemper in dubiis pro reo reſpondendum*; and as ſuch After-Verdicts tend as much to load the former Jurors with Perjury, *(for their not having well truly try'd the Caſe)* as to Convict him of a Crime, who by the Verdict of his *Peers* was once found Innocent; ſo ſuch ſecondary Trials may not only endanger Innocence, but do plainly open the Gap, and ſtrike out the largeſt Avenues to all manner of Perjury and Subornation of Witneſſes, and

(*z*) *Hundreds*, as containing 100 Towns, or furniſhing 100 Men for the Wars. A Juriſdiction over 10 Tithings, or 100 Families; and Hundredors were thoſe who lived within that Juriſdiction. (*a*) *Decemvirale Collegium*. (*b*) Counties. (*c*) Actions of Debt, Detinue, Replevin, *&c.* and ſuch as are relative to Poſſeſſion. (*d*) Actions for declaring or aſcertaining the Property of Lands. (*e*) Actions for deciding the Validity of Rights to, or upon Lands.

therefore

therefore it is hard to diſcover either ſolid Reaſon, or publick Utility for Countenancing of them, in any great Degree.

3. The Oath of a Woman ſaid to be *raviſhed*, is of no Import for the proving of a *Rape*, nor is ſhe ever examined by way of Evidence; it being a general Rule, that no Perſon having Intereſt, nor ſuch as may gain or loſe by the Cauſe, and much leſs any of the Parties themſelves, are ever admitted to be either Judges, Jurors, or Witneſſes in *Scotland*.

But if the Woman's Oath were to be received, why ſhould not the Man's be alſo taken? And ſince it is eaſie to believe, that the one would, and muſt be Repugnant to the other, it is thence Conſequential, that in Point of Evidence, both their Oaths ſhould go for nothing.

4. The Sheriffs, and all other Judges within the Kingdom, do imitate the Procedure of the Lords of Juſticiary, in Matters Criminal. And therefore in all Courts, the Pannel (or Perſon accuſed) is always allowed Procurators (*f*) or Advocates, who are permitted to Plead, and ſet forth the Matters of Fact, as well as the Points of Law deduced from them.

And in this there ſeems to be nothing unreaſonable; for as the niceſt Points of Law, do frequently ariſe from the ingenious Contexture of the Facts; ſo it is often out of the Priſoners Sphere, to ſtate the Facts ingeniouſly.

Beſides, in ſome Caſes, as in the Acceſſion to Crimes, *Art* and *Part*, *Ope & Conſilio*, and the like, the Law and Fact are ſo interwoven, that the Separation of them is abſolutely Repugnant to the Nature of the Thing: And therefore, ſince *ex facto Jus oritur*, the *Counſel* is allowed to ſpeak to the one as well as the other.

And both the Fact and Law being thus intruſted to the Skill (*g*) and Management of the Counſel, the Conſequence is, that tho' the Perſon accuſed may ſpeak, and indeed ſpeak what he pleaſes, yet he ordinarily is abſolutely Silent during the whole Trial; and he is never forced to plead, leſt his Life ſhould be endangered thorough his own Un-

(*f*) *Alias* Prolocutors. (*g*) Skilfulneſs.

ſkilfulneſs or Simplicity ; for many Priſoners would make much better *Bargemen*, than they could do *Barreſters*.

A Phyſician is not deſired to preſcribe the Medicines, or to explain the Qualities of them, without being firſt allowed to probe his Patient's Wounds, and to enquire into the Nature of his Diſeaſe : Why then ſhould the Counſel be obliged to ſuggeſt, and plead Points of Law without being allowed either to open the Fact, or yet to enter upon the Merits of the Cauſe ? They ſet forth the Fact as well as the Law in Civil ; and why ſhould they not have the ſame Privilege in Criminal Caſes ?

A Man in a high Fever, or one ſeized with an Ague, is not deſired to explain his Diſtemper, nor yet to find out his own Remedies ; and why then ſhould a Perſon arraign'd for a capital Crime, in a feveriſh Diſorder, and under the greateſt Perturbation of Spirit, by reaſon of Sickneſs, long Impriſonment, or the like ; or one in an Ague of Fear, thorough the Dread (*g*) of Puniſhment, the Horror of Death, or Thoughts of Eternity, be neceſſitate to dilate upon the Caſe, plead his own Cauſe, or yet to find out, and ſet forth his own Defence ?

And ſurely *tho' low Education, Under-Age, Baſhfulneſs, or Levity, Old Age, Simplicity, Weakneſs, or Inadvertency, may be Failures*, yet they are not puniſhable as *Crimes* : But then Priſoners may often ſuffer through ſome or other of them, by being neceſſitate ſolely to undertake their own Defence, or to enter upon the Merits of their Cauſe. And therefore it ſeems wiſely provided, that neither Sheriffs, nor other Judges can lay their *Pannels* (*h*) under ſuch Hardſhips, or Diſadvantages : And as ſome Lawyers of other Countries have obſerved, That the Law of *Scotland* allows as fair a Trial, as any Law in the World ; ſo from what has been ſaid, it is apparent, that if any Abuſes are committed, they are juſtly Chargeable upon the Judges and Jury, and not at all upon the Laws of the Country.

(*g*) *Timor gravis.* (*h*) Priſoners.

STEW-

STEWARTS.

ROBERT 2d, (*i*) Grand-Child of *Robert* the Firſt, (ſurnamed the *Bruyſe*, who fought the famous Battle of *Bannock-Burn*) was the Hundredth lineal King of the *Scottiſh* Race, and was the firſt of the *Stewarts*, ſo called from their being *Seneſcalli Scotiæ*, or *Stewards of Scotland*; a Title, Office, or Dignity, frequently veſted in the apparent Heir of the Crown, before he ſucceeded to be King.

But beſides the *Seneſcallus* (*k*) *Scotiæ*, there were afterwards ſeveral other *Stewarts* in *Scotland*, who were a kind of Sheriffs within the King's own peculiar Lands.

BAILIARIES.

FOR when Lands forfeited to the Crown, they were ordinarily erected into Stewartries, or *Bailliaries*; theſe *Baillies* had a Juriſdiction reſembling, if not preciſely the ſame, with that of Sheriffs; whereas the *Stewarts* had, and have the ſame Power, and Privileges, that are, or were Competent to Lords of Regality.

Lords of REGALITY.

REgalities were *Feus or Fiefs granted by the Sovereign to the Subject, with a Royal Dignity annex'd*: For ſupporting this Definition, it is fit to know, that by the Feudal Law, *alia erant Regalia, alia regalem dignitatem habentia*; the firſt related to the Privileges or Prerogatives of the Prince, but *Regalities* were comprehended under the latter.

They had their Origin from the *Feudal Law*, and whilſt it was in Vigour, the Privileges of a Lord of Regality run ſo very high, that he was called *Regulus*, as reſembling a little King within his own Territory (*l*).

(*i*) *Alias* Blear-Eye. (*k*) From *Sein*, a Houſe and *Schale*, *i. e.* Governour of a Houſe or Tribe. (*l*) Precinct.

Any of the *Lieges* (ſo called from the Word *Ligati*, as being bound to do Fealty and Homage to the Sovereign) having either the *Dominium directum*, or the *Dominium utile* (*m*) of Lands, was capable of getting them erected into a Regality.

And thence it came to paſs, that ordinary *Barons* frequently obtained ſuch *Erections*, and upon ſo doing were always thereafter called *Lords of Regality*.

The moſt probable Reaſon, for giving that Title to an ordinary Baron, or to any undignified Perſon, was that by the ſtrict Rules of the Feudal Law, Regalities appertained only to *Dukedoms*, *Marchionates and Earldoms*; but being otherways beſtowed by the *Scots Laws*, they were continued to thoſe, upon whom they were collated, with the ſame Titles and Privileges, that were inherent in ſuch Regalities, by the Feudal Law: Lords of Regality have as ample Juriſdiction in Civil Caſes, as Sheriffs, Stewarts, or any other inferior Judicature.

But in *Criminals* they have a Power and Privilege of *Repledging* from all pedanious (*n*) Courts; that is to ſay, the Lord of Regality, or his Baillie (*o*) or Procurator, may compear and crave, that the Perſon dwelling within his Territory (*p*) may be ſent back to be Judged by him.

And in ſuch Caſes, the Lord of Regality finds Bail to proceed againſt the Delinquent within a Year.

Lords of Regality have alſo a very ſingular Privilege of being allowed the Moveables (*q*) of ſuch condemned Delinquents, as did dwell within their reſpective Territories.

But here it is obſervable, that nothing in the Law of *Scotland* appears to be more unwarrantable, than the allowing to Lords of Regality, or to any other inferior Judges, the Moveables (*r*) of ſuch Perſons as they Condemn; this indeed is apparently repugnant to right Reaſon, and ſeems to be contrary to the Analogy, and general Deſign of all Laws.

For, why ſhould Judges have any Intereſt, or Advantage by condemning of their Priſoners? And ſince ſome will have it, That in a ſtrict Senſe, *Nemo Juſtus, nemo uſq; ad unum*; and ſeeing Men can

(*m*) Property or Seignory. (*n*) Inferior. (*o*) Deputy. (*p*) Precinct.
(*q*) Goods and Chattels. (*r*) Goods and Chattels.

ſcarcely

ſcarcely be kept in their Duty, by the ſtricteſt, and beſt digeſted Laws that can be made, what Reaſon can there be for tempting, or rather bribing of Judges to abuſe that exuberant Truſt, which the Law, of Neceſſity, muſt repoſe in them?

From the ſame Principle it is likewiſe hard to juſtifie the Taking of *Sentence Money (r)*, and the other Court Perquiſites, ariſing to inferior Judges in Civil Caſes; for as ſuch Fees of *toties quoties*, do contain ſomething that is ſordidly mean, and apparently below the Dignity of thoſe, who repreſent the Sovereign in a Judicative Capacity; ſo at firſt they ſeem to have been introduced (with the other Feudal Cuſtoms) whilſt the Country remained barbarous, tho' hitherto they have never been diſcontinued, as being the *poſſeſſory Rights*, and Privileges of thoſe who lay Claim to them.

However, the Lords of Seſſion, Commiſſioners of Juſticiary, and Barons of *Exchequer*, are all furniſhed with ſuitable Salaries *(ſ)* out of the Treaſury, or publick Revenues, and are conſequently precluded from all manner of Fees, Dues, or Court Perquiſites; and probably it could be no Hindrance to the more quick, and impartial Adminiſtration of Juſtice, that Lords of Regality, and all other Judges were put upon the ſame Footing, and prohibited from receiving all other Emoluments.

Regalities were either *Laick* or *Eccleſiaſtick*; the firſt could ſimply Repledge, from the Lords of Juſticiary, but the latter had only that Privilege when they prevened the Juſtices by the firſt Citation or Attachment.

For underſtanding the Reaſon of this Diſtinction, it is fit to know that the Generality of all the *Abbacies* of *Scotland* were of Old erected into Regalities; and at the Reformation all Church-Lands, or the *Temporality* of Benefices, were annext to the Crown, it being then and thereby propoſed to exempt the People from all Taxations, by furniſhing the King with a Patrimony, or Eſtate of his own, ſufficient for ſupporting the Dignity of the Crown, without the Aid of any other Supply from his Subjects.

(r) A Fee, or Honorary for every Sentence or Interloquitor. (ſ) Penſions.

This

This was mainly deſigned to ſecure both King and People; ſo as they might never again look back to *Rome*, tho' afterwards it was thought Expedient, to diſſolve theſe Lands from the Crown, to erect them into Earldoms and Lordſhips, and to confer them upon the keeneſt Inſtruments of the Reformation, who were by Conſequence called *Lords of Erection.*

But then, tho' theſe Lords of Erection had got the Church-Lands, yet they had no Title to the *Eccleſiaſtick Regalities* without new Grants from the King; and in all ſuch Grants, his Majeſty thought fit to Reſtrain the ancient Powers of *Repledging.*

However, this Diſtinction and Diviſion of Regalities is not now ſo Material as it formerly was, becauſe at this Day no Lords of Regality can Repledge from the Commiſſioners of Juſticiary, tho' ſometimes they are allowed to ſit with them, in Caſes where *Repledging* was formerly Competent.

BURGHS.

THERE are three Kinds (*t*) of *Burghs* in *Scotland*, viz. *Burghs Royal, Burghs of Regality, and Burghs of Barony.*

But the firſt of theſe only falls regularly to be treated of here, becauſe the Governours, or Baillies of Burghs of Regality, and Barony, have only their Commiſſions from the Proprietors or Superiors (*u*) of ſuch Burghs, and ſo are not properly Judges, at leaſt they do not directly Repreſent the Sovereign in any Judicative Capacity, or if any of them are in ſuch a Capacity, the Nature of it is explained in the Deſcription of Lords of Regality, and Barons: But then *Royal Burghs* (*x*) are ſuch as have *Charters* from the Sovereign, containing certain Privileges and Immunities, and erecting them into *Burghs Royal*; and it is merely in Virtue of this Erection, that they (and not the other Burghs) do ſend Repreſentatives to Parliament; for if a *Burgh-Royal* had only Ten, and any other Burgh had 10,000 Inhabitants, only the Ten, and not the 10,000 could be repreſented in Parliament.

(*t*) Sorts. (*u*) Over-Lords. (*x*) Magiſtrates of Burghs-Royal.

There are in *Scotland*, Sixty-ſix Royal Burghs, and Thirty-three Counties, including the Iſlands of *Orkney* and *Zetland*, and reckoning thoſe Iſlands only for one County; and before the *Union* every Burgh had one, and the City of *Edenburgh* had two Repreſentatives, in the *Scotch* Parliaments; ſo that the Eſtate of Burgeſſes conſiſted of Sixty-ſeven.

And there were Ninety Members of the Counties (excluſive of the Nobility and Biſhops) and ſuch as have now Right to Vote in Elections of County-Knights, as holding their Lands of the King *in Capite* were of old, and ſoon after Parliaments firſt begun, frequently Summoned to appear in them.

But the Number of the *Scotch* Members was much diminiſhed by the Union of the two Kingdoms; for now all *Scotland* is repreſented by Sixteen Peers, and Forty-five Commoners, without the Commixture or Interpoſition of any *Biſhops*.

Of theſe Commoners Thirty do repreſent the Counties; for every County is allowed *One*, excepting the Counties of *Bute*, and *Carthneſs*, *Nairn*, and *Cromarty*, *Clackmanan*, and *Kinroſs*, every Two of which are only allowed *per Vices* to chuſe and elect one ſingle Commoner.

The Burghs are repreſented by the Fifteen remaining Commoners, of which the City of *Edinburgh* is always allowed to elect *One*, and the other Sixty-five *Royal Burghs* are thrown, or divided into Fourteen different *Diſtricts*, and every Diſtrict of Burghs is allowed to ſend and make Choice of a Member for repreſenting ſuch a Diſtrict.

Theſe Commoners uſed to have their Charges defrayed, at the Expence of the reſpective *Burghs*, or *Counties*, which they repreſented; but *now* ſuch is their diſintereſted publick Spiritedneſs, that nothing is demanded from their Conſtituents under that *Title*.

But to ſpeak more particularly of *Royal Burghs*, they are governed by a Lord Provoſt, Baillies, and Town Council (*y*); and tho' every Town hath but one Provoſt, yet the Number of Baillies and Counſellors doth vary according to the Bigneſs of the City or Sett (*z*) of the

(*y*) *Mayor* and *Aldermen*.

(*z*) The ancient Cuſtom of the Burgh declared and aſcertainedby the general Convention of Burghs or Burrows.

Burgh; but in all Towns the Provoſt and Bailiffs are only properly termed the *Magiſtrates.*

Their Juriſdiction only reacheth to their own *Burgeſſes*, or Inhabitants of the Burgh, and is much the ſame with what the Sheriffs exerciſe over the Counties; and ſometimes Burghs have the Privilege of being *Sheriffs* within *themſelves.*

This Privilege doth not exempt them from the Sheriff's Juriſdiction, but only gives them a cumulative Power with him; ſo that if a Delinquent were cited before the Sheriff, and likewiſe before the Baillies for the ſame Treſpaſs, there would be *locus præventioni*, and the *firſt Attacher* would be preferred.

And here it is obſervable, that Juriſdiction is founded to any Judge, either becauſe the Defendant lives, or has Goods, Chattels, or any Eſtate within his Territory (*a*), or elſe becauſe the Delict or Crime was committed within the Bounds of it; and this in the Civil Law is rendered thus, *Sortiri forum ratione Domicilii, ratione rei ſitæ, vel ratione Delicti.*

Burgeſſes are by their *Burgeſs-Oaths*, and the Nature of their Tenures, bound to *Fealty* (*b*), and to attend their Magiſtrates at publick Appearances; and upon Decreets (*c*) obtained before them for Civil Debts, *Precepts, of Warding* (*d*), are frequently iſſued by their Clerk of Court againſt their Burgeſſes, which is a Thing not practiſed in any other inferior Judicatures.

But the true Nature, Meaſures, and preciſe Limits of their Juriſdiction, are beſt known, from their own *Charters of Erection*, by which the Power of *Pitt and Gallows*, (which imports a Privilege of Judging even in the Caſes of Life and Death) is frequently conceded to them; and every Provoſt of a Royal Burgh is ordinarily a Juſtice of Peace, within his own Territory; and what a Juſtice of a Peace is, ſhall be afterwards explained in the proper Place: But this much may here ſuffice, as to theſe Magiſtrates, becauſe they muſt be once more mentioned, when I come to Delate upon *Burgage-Tenures.*

(*a*) Bounds of his Precinct. (*b*) Fidelity. (*c*) Judgments. (*d*) Ca. Sa. or Warrants of Incarceration.

BARONS.

A Perſon infeft (*e*) in Lands, tho' not erected into a Barony, is in a lax Signification, and even in Conſtruction of Law, commonly taken for a Baron; but yet a *Baron* is more properly *he*, who holding his Lands immediately of the Crown, has by a Charter under the Great Seal, the Power of *Pitt and Gallows* conceded, and his Lands likewiſe *united*, and erected into one *plain Barony*.

This Deſcription of a *Baron* (conſidering the powerful Aſſiſtance to be afterwards mentioned, and which Barons of Old afforded to the King in his Wars) is not diſconſonant to the Opinion of thoſe *Engliſh* Lawyers, who derive the Word from *Belli robur, ſunt & alii potentes ſub Rege, qui dicuntur Barones, quaſi robur Belli* (*f*).

Barons of the firſt kind (whom for Diſtinction ſake I call improper Barons) may hold Courts, for cauſing their Tenants (*g*) pay their Rents; and if they be Infeft (*h*) *Cum Curiis*, they may Judge between Tenant and Tenant in ſmall Debts, and likeways Amerciate *for Breach of the Peace*, or for *Treſpaſſes* committed within the Limits of their own Lands.

Whereas *proper Barons* may not only Amerciate for Batteries in 50 *l. Scots*, and for Contumacy (*i*) in 10 *l.* But can likeways puniſh Thieves or other Delinquents capitally, if they be apprehended within the Barony.

And Barons of this Kind, were in the Old Law *called, Lord-Barons*: And thus, tho' *willful Fire-raiſing* be one of the Pleas of the Crown (*k*), yet Fire-raiſers in Country Towns, or Burghs of Barony, were reſerved to be Judged by their *Lords*, i. e. *by their Barons*.

And in *England* Barons by *Tenure* were Biſhops, who had Baronies annext to their Biſhopricks, and in Virtue thereof, were placed in the Houſe of Lords, and likeways termed Lords Spiritual, the Title of *Lord* not being Originally inherent either in the Ordination, or yet in Function of Biſhops.

(*e*) Infeoffed. (*f*) Bracton. (*g*) Leaſſees. (*h*) Inveſted. (*i*) Contempt.
(*k*) Reſerved by the King to be Judged by his own Juſtices.

But either a *proper* or *improper* Baron, is ordinarily intitled to *elect*, or yet to be *elected* a *Repreſentative* in Parliament for a County; providing that he be publickly infeft *in Property*, or *Superiority*, and in Poſſeſſion of a *Forty-Shilling Land* (*l*) *of old Extent* (independent of Few-Duties in Few-Lands) and holden of the Crown *in Capite*, or, 2dly, Infeft or in Poſſeſſion *of Lands* worth 400 *l. Scots* of *valued Rent*, the *valued Rent* being for the moſt part much below the real Rent: Or, 3dly, Infeft and in Poſſeſſion of Lands worth ten *Chalders* of Victual, or 1000 *l. Scots* of Yearly real Rent; but from this real Rent all Few-Duties are deducted, and the ſeveral Lands muſt be immediately holden of the King, or elſe they do not avail, altho' their *valued* or *real* Rent were never ſo much.

I ſaid that Barons are only ordinarily intituled to *Elect*, or to be *Elected*, becauſe ſometimes they may labour under either *Perſonal*, or *Legal* Diſqualifications; and thus a Madman, or a Fool, is not allowed to Vote; a *Papiſt* can neither Elect nor be Elected; a Miniſter can't be elected becauſe he muſt ſerve the Cure: And beſides, ſince the Abolition of Epiſcopacy, and the Suppreſſion of the *Eſtata of Biſhops*, it is conceived that no *Scotch Eccleſiaſticks* are repreſented in Parliament.

Tho' Electors ought regularly to be Infeft and in Poſſeſſion, yet an apparent Heir (*m*) may *Vote* tho' he be not Infeft.

But then he muſt ſhow that his Predeceſſors (*n*) ſtood infeft (*o*) in Lands of the *Holding*, *Extent*, *Valuation*, or *yearly Rent*, above-mentioned; theſe *Requiſites* appertaining to the fundamental Capacity of an Elector.

The Notion of the above-mentioned *Potentes ſub Rege, qui dicuntur Barones*, doth ſeemingly quadrate with the ancient Conſtitution or Condition of *Highland Lands*, or *Scots Chieftains*, who coming into the Field, with all their reſpective *Clans*, viz. Their Sons, Kindred, Vaſſals, Family and Servants, might be called *Potentes* from the powerful Aſſiſtance which they gave in the Wars: And the Inſtitution of Barons was very Old in *Scotland*, having been introduced with the Feudal Law, and which the *Scots*, by their Alliances with *France*, had derived

(*l*) *Scots* Money. (*m*) He who ſhould be Heir. (*n*) Anceſtor. (*o*) Seized.

to

to them from thence, about the Year 1004, in the Reign of *Malcome* the 2d, who begun his Reign 62 Years before the *Norman Conqueſt*; whereas the *Feudal Law*, only took Place in *England*, at or after the Conqueſt, *William Duke of Normandy*, the *Conqueror*, having thought fit to alter the ancient Laws of the Country, and to ſubſtitute the Feudal Cuſtoms in their Place; becauſe, as the Feudal *Vaſſalage*, and *Fealty*, created a Dependance on that Prince, ſo the *Wards*, *Eſchets*, *Penalties*, and *Caſualties* ariſing from the Feudal Rights, were more likely to fill his Coffers, and augment his Revenue, the better to ſupport his then recent Conqueſt over *England*, than any Thing that could have been Levied in Conſequence of the ancient and peculiar Laws of that Country.

From the Word *Baron* proceeded *Baronet*, (or *Baronettus*) which is a Dignity or Order of Knighthood, that was Inſtituted by King *James* the 6th of *Scotland*, and firſt of *England*, in the Year 1611, and by him Dignified with *Precedency* before all *Banerets*, *Knights of the Bath*, *and Knights Bachelors*, excepting only ſuch *Banerets*, as were Knighted in the *Field*, either for reſcuing the Perſon of the Prince, or for doing ſome Magnanimous Action in his Preſence; and thus Banerets, *Qui creati erant ſub vexillis Regiis, in exercitu regali, in aperto Bello, & ipſo Rege perſonaliter præſente*, have the Precedency of all *Baronets*.

JUSTICES.

JUSTICES of the Peace, (called Irenarchæ *in the Civil Law) are thoſe who are legally authorized to Advert to the keeping of the Peace within the Bounds of the reſpective Counties where they dwell and reſide.*

The *Engliſh* Lawyers ſay, That they are called *Juſtices*, and not *Judges* of the Peace, becauſe they have their Powers, by Commiſſion or Deputation, and not *Jure Magiſtratus*; which is likewiſe the Reaſon why they can't Depute others in their ſtead; however this *Jus Magiſtratus* is hardly underſtood in the Law of *Scotland*; for, by the pureſt Principles of that Law, the *Jus Magiſtratus* was ſolely ſtated in the Perſon of the Prince; ſo that all Judges, as well as thoſe Juſtices, were nothing elſe but his Majeſty's Delegates, or Deputies.

Their

Their Juriſdiction reacheth properly to the Tranſgreſſors of Penal Statutes, *Slayers* (*p*) of *Red-Fiſh*, *Cutters of Green-wood*, *and to the Committers of Petty* (*q*) *Riots*, *or Treſpaſſes*: But yet the Juſtices can't regularly proceed even in theſe Caſes, until 15 Days expire after Commiſſion of the Riot or Treſpaſs, that Time being allowed for ſalving the Juriſdiction of Sheriffs and other competent Judges, that ſo they may have an Opportunity of *prevening* the Juſtices, if they ſhall think fit ſo to do.

But the Juſtices are the immediate and proper Judges of Servants, their Services, and Fees, of the mending of Roads, or High-ways, and in ſeveral other Caſes of the like Nature, where the Peace or good Neighbourhood of the Country is concerned.

They are likewiſe directly Judges in, and may legally Amerciate for, the unlawful Concealment of Ale, Beer, Spirits or others, liable in Exciſe; and theſe Juſtices are likewiſe frequently conſtituted Commiſſioners of his Majeſty's Ceſs or Supply (*r*), and in that Capacity, their Determinations or Awards are by ſome late Statutes, in a great Meaſure, declared to be *final*; I ſay, in *a great Meaſure*, becauſe upon Grave and Weighty Conſiderations, and clear Evidence of any palpable Abuſe, the *Barons of Exchequer*, will interpoſe their Authority, that ſo Juſtice may be impartially Adminiſtrated. And as Experience has ſometimes ſhown that ſuch *Interpoſition* was Neceſſary; ſo upon the Matter it ſeems pretty ſingular, that ſo much of the laſt *Reſort of Power* ſhould be placed in any inferior Judicature.

The *Juſtices of Peace* may Cauſe apprehend all *Rebels*, *Robbers*, or ſuſpected Perſons; but yet they cannot Judge them when they are ſo apprehended. And thus the *Irenarchæ* in the *Civil*, the *Juſtices* in the *Scotch*, and the *Leets* mentioned in the *Engliſh* Law, bear ſo much Reſemblance to one another, that they might, or may take Precognitions, and make Inquiries into many Crimes, of which they are by no Means authorized to be Judges; and this Co-incidence has partly happened by Reaſon that the Juſtices of Peace were ſettled in *Scotland*, by

(*p*) Killers. (*q*) *Petit* or Puny. (*r*) Land-Tax.

King *James* the Firſt of *England*; at leaſt, I remember to have ſeen no Statutes either Settling or Regulating them antecedent to his Reign.

Theſe Juſtices are ſerved by a Sett of *Tipſtaffs*, called *Conſtables*. Their Buſineſs is to receive and execute the Orders of the Juſtices, and the Warrants of Commitment iſſued by them.

But *Latrunculatores*, *Latronum expulſores*, λησοδιωκται (from λησης *latro* & διωκω *perſequor vel fugo*) are all Terms uſed by Lawyers, which ſeem to be more Expreſſive of the true Meaning and Buſineſs of a *Conſtable*, than the Word it ſelf is.

HAVING thus briefly deſcribed the various Kinds of Judges, their Powers, Privileges, and ſubject Matter of their ſeveral and reſpective Juriſdictions, aiming to touch at every Thing that is Material, and Entertaining, without having troubled the Reader with what was Unneceſſary or Superfluous. I next proceed to mention the other Perſons, of whom the Law treats: For tho' *Judges* be the *Chief*, yet there are alſo other Perſons treated of in Law, and theſe I conceive may be moſt Comprehenſively deſcribed under the *Title* of *Tutors*, *Curators*, *Pupils*, *Minors*, *Perſons Interdicted*, or otherways *Incapacitate*, and *Married Perſons* (*ſ*).

Tutory (from *Tueri* to Defend) *is a Power, Commiſſion, or Privilege of governing the Perſons, as well as the Eſtates of Pupils*; whereas, *Curatry* (from *curare* to Care for) relateth only to the Management, and Adminiſtration of the Means and Eſtates of Minors, for *Tutor datur Perſonæ & Curator rei*; and a Tutor Signs for his Pupil; but a Minor muſt Subſcribe with his Curator; and *Pupillarity* laſts to twelve in Females, and to fourteen in Males; but Minority ends in both at Twenty-one Years compleat.

There are in *Scotland* three Kinds of Tutors (*t*), *viz. Tutor Nominate*, *Tutor in Law*, *and Tutor dative*; and it may be ſaid, That the Tutor Nominate has properly the *Commiſſion*; the Tutor in Law the *Privilege*, and the Tutor dative has nothing, but the legal Powers of *Tutelation*.

(*ſ*) Tutors, Curators, Pupils and Minors. (*t*) Guardians.

Tutor

Tutor (*u*) *Nominate* is he who is named by the Father in ſome Writing, for the Nomination and Appointment of *Tutor Perſonæ*, appertaineth only to the Father, that being a Conſequence of his *Patria poteſtas*; and tho' any Perſon may appoint a Tutor for managing what he gives or bequeaths to a *Pupil*, yet that is only a *Curator bonus datus*, but not a *Tutor Perſonæ*.

Tutor in Law is the neareſt Agnate (*x*), being paſt Twenty-five Years of Age, and who would be Heir to the *Pupil*; For, ſays the Law, if *Tutory* be a *Munus*, the neareſt Agnate has Right to it; but if it be an *Onus*, he ought to bear it, becauſe *Quem ſequitur Commodum, eum debet ſequi Incommodum.*

But tho' this may be Equity, yet the Law of *England* ſeems to be as much founded upon *Expedience*, by expreſsly debarring the *neareſt Agnats*, or *apparent Heirs*, from being Tutors; and ſeveral of the *Scotch* Kings have been murdered by Tutors of that kind, upon Hopes of enjoying the Crown after the Demiſe of their Pupils; ſo that Experience ſhows the Expedience of the *Engliſh* Law in that particular.

Tutor Dative (as the Word implies) is he that is given by the King, or one that gets a Gift paſt in *Exchequer* of being Tutor Dative, which is only granted where there is no Tutor Nominate, or where he, or the Tutor in Law, doth not accept or adminiſtrate.

Both Tutors and Curators are obliged to make full Inventories of all their Pupils Aſſets, Chattels, Means and Eſtates, which Inventories muſt be ſubſcribed, by the Tutors or Curators, and by two of the neareſt of Kin of the Minor upon the Father's ſide, and as many of his neareſt of Kin upon the Mother's ſide; and theſe Inventories muſt be recorded before the Judge ordinary, and a Duplicate thereof is left with the Tutor or Curator, and two more are given to the neareſt of Kin on both ſides.

And if either Tutor or Curator, neglect or omit to make Inventories, they are conſtructed Imbezillers, and are neither allowed Salaries nor Expences, but may be removed from their Offices as Suſpect.

Tutors, Curators, and all who behave as ſuch, are liable *in ſolidum*, (*y*), and for moſt exact Diligence, *& pro Culpa leviſſima*, unleſs it be

(*u*) Guardian. (*x*) He that is related by the Father. Vid. p. 189. (*y*) All of them for the Fault or Negligence of any one, *& econtra*.

otherways provided by the Defunct; and all Tutors (excepting theſe appointed by the Father, who is preſumed to have choſen fit Perſons) are obliged to find Caution (*z*), *de fideli Adminiſtratione.*

If divers *Tutors*, or *Curators* be named *disjunctively*, the Office upon the Death of any one of them doth accreſs to the Survivors; but if they are named *conjunctively*, or made Joint-Tutors, then the Nomination fails upon the Death of any one, the Teſtator or Defunct not having ſingly truſted any one of them.

But as the expeding a Gift of Tutory Dative is the moſt proper Remedy in ſuch Caſes, ſo it is not improbable, that the Survivor might be preferred to any ordinary or indifferent Perſon, who wou'd apply for ſuch a Gift, becauſe thoſe of the Teſtator's Nomination are rather to be truſted than mere Strangers.

As the Law by its Juſtice doth protect the *Perſons* and *Eſtates* of *Minors* (*a*), ſo by its *Clemency* it doth favour them with many ſingular Privileges.

And thus a Minor is not obliged to Anſwer in any Action for evicting his Father's Inheritance; *Minor non tenetur placitare ſuper hæreditate paterna:* But there are divers Exceptions from this Rule; as for Inſtance, if the Minor's Right be only Conſequentially Quarrelled, the chief Right Quarrelled belonging to a Major, or if his Right be called in Queſtion for his Father's Treaſon, or other Crimes, the Minor is obliged to Anſwer; and the like holds in ſundry other Caſes, which can be beſt known from Practice, and the ſeveral ſpecial Treaties upon that Subject.

2dly, The Minor is allowed four Years, after his Majority (*b*), for recalling what was done to his Prejudice during his leſs Age, and theſe are termed the *Anni utiles*, or *Quadriennium utile*; during which Space, if *Minority* and *Leſion* are inſtructed, Redreſs or Relief is always to be granted.

3dly, In moſt Caſes *Preſcription* (*c*) doth not run againſt Minors, becauſe Negligence is not puniſhable in them.

(*z*) Bail. (*a*) A Term for Pupil as well as Minor. (*b*) 21ſt Year of his Age.
(*c*) Uſucap.

But,

But, if a Major do not bring his Tutors, or Curators to an Account within ten Years after his Majority, and if their Action for Expences, or the *Actio Tutelæ contraria*, be not commenced within that Time, then either, or both Actions will be cut off by Preſcription.

Tutors and Curators are obliged to lay out their Minor's Money-Rents upon Intereſt within ſix Months, and his Victual-Rent within a Year after the reſpective Terms of Payment; and all Bonds muſt be renewed, and the Intereſt due upon them turned into a Principal Sum once during their Office; and if there be a Tutor or Curator *ſine quo non*, he muſt always be one of the Conſenters and Managers.

A Woman cannot be ſerved Tutor in Law, that being *virile Officium*, but yet ſhe may be either Tutrix Dative, or Curatrix.

But no Tutors, nor Curators can purſue their Pupils, or Minors *ante redditas rationes*, or before they have firſt accounted for their own Receipts and Intromiſſions.

Perſons Interdicted.

INterdictions are of two Kinds, the one Judicial, and the other Voluntary.

A *Judicial Interdiction* is the authoritative Prohibition of Judges competent, diſcharging the Perſon Interdicted to *make*, and the Lieges to *receive* any Alienations of his Lands, or Heritages from him.

This Interdiction ought to proceed upon an Action commenced at the Inſtance of the neareſt of Kin againſt the Perſon to be interdicted; but yet where there is evident Cauſe for it, the Lords of Seſſion may Interdict *ex proprio Motu*.

A voluntary Interdiction is an Act of the Will, reduced to Writing, whereby a Perſon *conceiving*, that he is *weak*, *ſimple*, or *unfit* for Buſineſs, doth thereby oblige himſelf not to do any Thing to the Prejudice of his *heritable Eſtate* (for Interdictions reach only to Heritage) without the Conſent of ſuch Perſons, as are named in the Writ or Deed, and who are therefore called his *Interdictors*.

This Interdiction is perfected by Letters of Publication (*d*), proceeding upon it edictilly executed againſt the Lieges, and duly recorded.

Voluntary Interdictions may be reſcinded, if they are intended for the Perpetration of any Fraud, or if the Perſon interdicted be not truly either Weak or Prodigal, as is in them related.

And all Interdictions ceaſe with the Infirmity or Weakneſs which occaſioned them, becauſe *ſublata Cauſa tollitur effectus*; but then it muſt be found by the Diſquiſition of an Inqueſt, that the Cauſe or Defect is truly removed.

Altho' theſe Interdictions were derived from the Civil Law, yet the *Interdictiones aquæ & ignis*, therein mentioned, had a quite different Signification, and meant properly *Proſcription* or Baniſhment; for where a Man was interdicted from the Uſe of Water and Fire, within the *Roman* Empire; he was thereby Virtually *baniſhed out of it*.

IDIOTS, &c.

SUCH as are *Idiots*, *Lunatick*, or *Furious*, muſt be found to be ſo by an *Inqueſt* (*e*), for the Law ſtill preſumes the beſt, and that every Man is ſound enough in his Judgment, until the Contrary be made appear, becauſe *Qualitas quæ ineſſe debet facile præſumitur*.

But as all Preſumptions muſt cede to the Truth, ſo if a Man be found to be really a *Natural Fool*, *an Idiot*, *or Furious*, it is by a ſpecial Statute ordained, that the neareſt Agnates or Kinſmen be ſerved Tutors (*f*) in Law to him; and that according to the Diſpoſition of the Common Law, by which is meant the Civil Law of the *Romans*.

And tho' *Deaf and Dumb Perſons* are not mentioned in that Statute, yet they are certainly comprehended within the Intention of the Legiſlature, and are conſequently intitled to the full Benefit of it.

But tho' this Statute doth not hinder the Conſtitution of *Tutors Dative*, where the *Tutors at Law* do not Accept; and tho' in ordinary Caſes, theſe Tutors muſt be ſerved within a Year of the Teſtator's

(*d*) Prohibiting the Lieges from Purchaſing his Lands, &c. (*e*) Jury. (*f*) Guardians.

Death, yet in the Caſes of *Idiotry*, *Furioſity*, and ſuch like, the Guardians at Law would ſtill be preferred, offering to ſerve *Quandocunque*.

A Father is in all Caſes naturally the Tutor of his own Children; and if his Wife being an Heretrix, ſhould turn Furious, *He*, and not her *Agnats* would be Guardian: The Reaſon is, becauſe the Tutory (*g*) of Agnats taketh only Place, where there are no other legal Adminiſtrators; whereas in this Caſe, the Husband is legally an Adminiſtrator to his own Wife. Altho' the Law giveth Aid and Protection to ſuch as labour under natural Incapacities, yet *legal Incapacities* operate the quite Reverſe againſt thoſe who Misfortunately fall under them.

And thus *Non-jurants* are debarred from being Judges, and from having Offices, or publick Employments in the State.

And a *Papiſt* is incapacitate from receiving any Diſpoſition or Voluntary Right to Lands, Teinds, or the like: And by a ſpecial Statute, ſuch voluntary Rights are not only declared void, and the Lands to remain with the Grantor, but the Grantee is likewiſe debarred from all Action for Repetition, or Recovery of the Price.

But whatever Effect this Statute may have againſt *Papiſts*, it doth not reach the *Jews*; and it is to be wiſh'd, that it may *ſuggeſt no* Temptation to any *Mala Praxis* amongſt *Proteſtants*; for if a *Proteſtant*, after getting back his Lands, ſhould nevertheleſs retain the *Papiſt*'s Money, who had once fairly bought them, there can be no great Hereſy in thinking, that the *Proteſtant* would not be the better *Chriſtian* for ſo doing.

Minors, and *Perſons interdicted*, may acquire Rights, but they cannot tranſmit any, for they may make their Eſtates better, tho' they be not allowed to make them worſe; *Papiſts* cannot acquire Rights, but they may legally tranſmit what they have, eſpecially if ſuch Tranſmiſſions be in Favours of *Proteſtants*; and becauſe *Furioſus abſentis loco eſt*, therefore a furious Perſon is (in Conſtruction of Law) neither capable of acquiring, nor yet of tranſmitting any Rights.

And thence it follows that ſome Perſons may *acquire*, tho' they cannot *tranſmit* (*h*); others can *tranſmit*, tho' they cannot *acquire*; and

(*g*) Guardianſhip. (*h*) Convey.

ſome

ſome there are who can neither *acquire*, nor yet *tranſmit* (*i*) any Rights whatſoever.

Married Perſons.

Marriage is commonly defined to be *the Conjunction of Man and Wife, vowing to live inſeparably together until Death.*

But if this Conjunction be the main Conſtitutive and Eſſential Part of Matrimony, it will thence follow, that *Idiots* or *Madmen* can Marry, as being capable of *Conjunction*, tho' they be not Conſenting; but as *Furioſus abſentis loco eſt, & conſentiri non videtur:* So it were Abſurd to imagine that ever Marriage can be habily Conſtitute without the true Conſent of both Parties.

And therefore, the *Civilians* ſay, That *Conſenſus, ſed non Coitus, facit Matrimonium*; but yet, if that were ſtrictly true, it would thence follow, that *Impotent Perſons* might validly Marry, ſeeing the moſt Impotent Men in the World may be thought Capable of conſenting; but that doth not hold, becauſe (as has been already ſhewn) (*k*) Marriages are declared to have been Null *ab initio*, or to have been no Marriages by Reaſon of *Impotence.*

And therefore in Order to ſail clear of both theſe Rocks, I humbly define Marriage to be *the habile Conſent of Male and Female, having the Power of Copulation* (*l*), *and vowing to live in Union together, until the Demiſe of either of them.*

Tully maketh this *Union* betwixt Man and Wife the cloſeſt, and neareſt of all Societies, and from this Conjugal Society, doth ariſe the Communion of Goods betwixt Husband and Wife; but the Adminiſtration thereof during Coverture, is ſolely in the Husband.

But then, as the Adminiſtration is ſtated in the Husband, therefore the Law hath ſo ſecured the Wife, that (unleſs ſhe be *præpoſita Negotiis*) ſhe cannot for any Civil Debt be legally Incarcerate during her Marriage.

The Husband is liable for the Wife's Debts, ſo far as he was a Gainer by her Eſtate, and as far as the Goods in the Communion will extend.

(*i*) Convey. (*k*) *Vide* Commiſſaries. (*l*) Or *Capacitatem coeundi.*

But

But yet, if he Executes an Inhibition (*m*) againſt her, he will not be anſwerable for ſuch of her Debts as may be afterwards contracted.

However, he is ſtill obliged to provide for his Family, and to Aliment his Wife; and if he ſhould either deſert, or treat her Inhumanly, the Lords of Seſſion would modifie a ſuitable Aliment to her, out of her Husband's Means and Eſtate.

The *Dominium*, or Property of the Wife's Lands, doth not appertain to the Husband; ſo that in Point of Succeſſion, her Heirs of a ſecond Marriage would exclude the Husband's neareſt of Kin, if there were no Children procreate of the firſt Marriage.

But then, a Husband during the Marriage has, *Jure Mariti*, a Right of receiving the Fruits and Profits of her Eſtates, and this *Jus Mariti* is ſo inherent in the Quality of a Husband, that it is not in his Power to renounce it.

And if he Marries an *Heretrix*, he has, by the *Courteſy* of *Scotland*, a Right to all her Lands after her Death during his own Life, if there was a Child procreate of the Marriage who was heard Cry.

And the Wife, *Jure Relictæ*, has, after her Husband's Deceaſe, Right to a third Part of his Moveables (*n*) if there be Children, and to the Half of them if there be none: She has likewiſe Right to a *Terce*, or third Part of the Lands whereof the Husband died Infeft (*o*): But ſhe may be excluded from both theſe Proviſions, either tacitly or expreſsly, either by Paction, or yet by Marriage Settlement; but ſuch excluding Pactions muſt be always reduced to Writing.

And tho' ſuch Pactions were reduced to Write, yet if they were entered into during the Marriage, they, as well as all *Donations* made betwixt Man and Wife, *Stante Matrimonio*, would be reducible (*p*), except in ſo far as they appeared to be Rational, *and ſuitable Proviſions*.

And therefore when the Wife reſolves to tranſmit (*q*) any Right to her Husband, or to any third Party for his Behoof, ſhe muſt do it *Judicially*, and muſt Declare before the Judge, (without the Preſence of

(*m*) Prohibition from contracting Debt, it muſt be Edictly executed at the Mercat-Croſs, and Regiſtrat. (*n*) Money and Goods, or Perſonal Eſtate. (*o*) Had Livery of Seiſin.
(*p*) Might be reſcinded. (*q*) Convey.

her Husband) That ſhe doth it ſpontaneouſly ; and ſhe muſt alſo make Oath, that ſhe was not compelled *Vi aut metu*, to grant that Deed, and then it is made a Rule of Court, and thereby becomes an effectual Tranſmiſſion.

The Reaſon of all this Ceremony and Solemnity is, that the Law ſuſpects the dangerous and unreaſonable Effects of that *Love*, *Fear*, or *Importunity*, which frequently Intervenes betwixt Husband and Wife.

Having thus briefly ſuggeſted the Requiſites neceſſary, in Order to the effectual Conſtitution of Matrimony, and likewiſe glanced at the moſt Material of the Civil Effects and Conſequences of it, it only now remains to ſuggeſt a few Things concerning the *Diſſolution* of the ſame.

And as in the Deſcription of Commiſſaries, I have pointed out their Powers of declaring Marriage Null *ab intio*, for the *Contingence of Blood*, &c. So it is only here obſervable, That *Couſin-Germans*, but none nearer, either in *Affinity*, or *Conſanguinity*, are allowed to Marry.

But waving the diſtinguiſhing Differences, betwixt the declaring Marriage Null *ab initio*, and of the *ſeparatio Menſæ & Thori*, from the *actual Diſſolution of the very Bond of Matrimony* ; it ſhall, and may be here taken for granted, that Marriage is really and naturally diſſolved by the Death of either of the Parties ; and if that Diſſolution, happens within a Year and a Day of the Celebration of Matrimony, the Conſequence is, That all Things done in Contemplation of it, do return into the ſame Condition they were in before the Marriage, unleſs it be otherwiſe provided by the Marriage-Settlement, or elſe that there was a living Child procreate of the Marriage who was heard Cry.

After the Natural Diſſolution of Matrimony, Children are not obliged to prove, that their Parents were Married, for that is preſumed from *Cohabitation*, or their living together.

And therefore their Children are preſumed to have been begotten in lawful Wedlock, unleſs the Contrary can be Habily inſtructed.

And tho' they had been born, or begotten before the Marriage, yet the ſubſequent Marriage of their Parents would Legitimate them ; but in ſuch Caſes they are *Liberi legitimati* rather than *legitimi*.

But where both Father and Mother are lawfully Married, and do Concur in aſſerting their Children to have been lawfully begotten, and do alſo Treat and Entertain them as lawful Children during the whole Courſe of their Lives, in that Caſe the Teſtimony of theſe *Conteſtes* is, in the Opinion of Lawyers, not only ſufficient *fidem facere*, to obtain Credit, or to attract the Conviction of Mankind, but is likewiſe in Conſtruction of Law a *plenary Probation, or full legal Evidence*: Nay, it is ſo ſtrong, that it is hardly to be Counterballanced by any contrary Proof: For, as the Preſumption of Law is ſtill for *Legitimacy*, ſo certainly Parents are the beſt Judges, as well as the beſt Witneſſes, of the *Lawfulneſs* and *Legitimacy* of their own Children.

Nay, the Civilians go a little further, and affirm, that *Nominatio Parentis inducit filiationem in dubio.* But tho' that be not ſo ſtrong and concluding as the Nomination of both Parents joined to their conſtant Entertainment of the Child after a Manner ſuitable to their Rank and Condition, yet certainly there is a good deal of Reaſon for that Rule of the *Civil Law*, if ſo be that the *Nominatio Parentis* was never retracted by the Father in his Life-time.

However, ſuch as are undeniably Baſtards, may Effectually tranſmit (*r*) both their Heritage and Moveables (*ſ*), to whom they pleaſe, providing that the Tranſmiſſions be extended (*t*) ſixty Days before the Death of the Grantors.

But then neither Lands nor Heritable *Rights*, can be tranſmitted by *Teſtament*; and tho' a *Will* were made in *England* where Heritage may be ſo tranſmitted, yet ſuch a Will would by no Means carry Right to Lands lying in *Scotland*, becauſe the Cuſtoms of *England* cannot alter the Nature, and ſo not the Tranſmiſſion of the *Scottiſh Rights.*

And yet a *Will* made in *England*, or a *Will* drawn up after the *Engliſh Manner*, would be ſuſtained in *Scotland*, ſo as to carry Right to any Thing, that were there tranſmiſſible by Teſtament, or that were properly the Subject Matter of a Will; but neither Lands, nor Heritages are conſtructed to be of that Nature, and ſo are not tranſmiſſible by any Will or Teſtament.

(*r*) Convey. (*ſ*) Real and Perſonal Eſtate. (*t*) Drawn out and ſubſcribed.

And tho' a Teſtament reacheth only to Moveables, yet a Baſtard can make no effectual Teſtament, unleſs he be either Legitimate by the Sovereign, or elſe have lawful Children of his own; and becauſe in *Scotland* all lawful Succeſſion is by the Father, therefore if a Baſtard hath no Children, he can have no Heirs at Law; for *Patrem demonſtrare Nequit*, and conſequently the King doth ſucceed to him *Quaſi ultimus hæres*; but yet the Baſtards lawful Children would always exclude the King.

Having in the firſt Part of this Paper glanced at the Laws of Nature, and Nations, and defined, divided and diſtinguiſhed them from the Civil, Municipal, and Fundamental Laws of particular Countries; and having alſo pointed out the Manner, Method, Solemnity, and whole Order of Procedure of the *Scottiſh* Trials in Criminal Caſes, and at the ſame Time ſuggeſted the Occurrent Lucubrations concerning the various Perſons of whom the Law treats; it is thence to be hoped, that the Reader, by the Help of his own Judgment, Memory, and Ratiocination, may be enabled to frame a tolerable clear *Idea* of all thoſe Matters. And therefore I proceed in the next Place to the Decyferation of *Dominium*, Property and Rights; theſe being the Second Thing treated of in Law.

DOMINIUM, Property and Rights.

PART II.

RIGHTS are only the Vehicles of *Property*, and therefore it is fit to explain the *Thing conveyed*, before the *Conveyances* of it.

And by the ſame Reaſon, ſuch as reſolve to be good *Conveyancers*, or to know the Habile and effectual Manner of tranſmitting Rights, ought firſt ſolidly to underſtand the Nature of the Thing tranſmitted, and the true Nature of Property, that being the ſubject Matter of them.

Dominium or *Property* is a *Right or Faculty of uſing or poſſeſſing what belongeth to us.*

And ſuitable to this Definition it is a ſovereign Rule, in all Matters of Property, That *Quiſq; eſt Moderator & Arbiter rei ſuæ.*

But then this Rule is limited by another that is equally as Juſt, *and which reſtrains a Man from uſing his own ſo, as thereby chiefly to prejudge his Neighbour.*

And thus, tho' in Conformity to the firſt Rule, a Perſon might Burn down his Houſe, or drown his own Lands; yet, by the 2d Rule, he is reſtrained from doing either of the Two, *in æmulationem Vicini*, or where the Neighbouring Houſes, or Adjacent Lands would ſuſtain or incur the like Prejudice.

The

The Ways of acquiring Property are various, according to the different Natures and Circumſtances of the Things acquired. And thus, by *Occupation* Property is acquired in a *Fox*, a *Hare*, or the like, how ſoon they are apprehended; and in the Caſe of *Maritime Captures*, Property is acquired in a Ship, how ſoon ſhe is diſmantled, or cut off from all Poſſibility of Eſcape.

The Owners of Cattle have Right to their Brood or Produce by *Acceſſion.*

The Proprietors of Lands have Right to Ground growing inſenſibly to theirs by *Alluvion.*

And by *Specification*, if the Species cannot be reduced to the Maſs of Matter of which it was made, it will belong to the Maker: And thus a Medicament or Plaiſter, made of another Man's Herbs, or Materials, will belong to the Maker, and not to the Owner of the Materials.

But yet, a Ring made of another Man's Gold, will not belong to the Maker, but to the Owner of the Gold, becauſe the Ring may be reduced to the ſame Maſs of Matter of which it was made.

When the Liquors of different Perſons are mixed together, the Property of the Compoſition is common to them all, and that by *Confuſion.*

When the Particulars mixed are dry and ſolid, and yet cannot be diſtinctly ſeparated, the Thing is ſtill common, and that of *Commixtion.*

When Things are either really, or ſymbolically delivered, the Property of them is transferred by *Tradition.*

Until a preferable Title can be exhibited, the Poſſeſſor is defended by ſeven Years *Poſſeſſion.*

And if he poſſeſs Lands in Virtue of any colourable Title, for 40 Years without Interruption, he acquires Right to them by *Preſcription.*

When a Man dies, his next Heir attains his Eſtate by a Right of *Succeſſion.*

A Perſon is not anſwerable for the Fruits and Rents of Lands levied, and conſumed by him, whilſt he had Reaſon to believe that the Lands belong'd to himſelf; and this is called a *bona fide Acquiſition.*

From all which it is eaſie to collect and remember, That Property is acquired either by *Occupation, Acceſſion, Alluvion, Specification, Confuſion, Commixtion,*

Commixtion, Tradition, Poſſeſſion, Preſcription, Succeſſion, or by a bona fide Acquiſition.

Notwithſtanding theſe various ways of acquiring Property, yet there were many Things which by the *Roman* and Canon Laws, fell not under Commerce, and ſo could not be acquired; as *res Univerſitatis*, Things *Sacred*; *Religious*; *and Publick*: Examples of which are, The *Streets*; *Temples*; *Images*; *Altars*; *Church-Lands*; *Navigable Rivers*; and the like.

But yet it is hardly warrantable to Affirm, that all this doth hold in *Scotland*, for Church-Lands are daily bought and ſold there; and tho' High-ways may be reckon'd amongſt *Things Publick*, ſince no particular Perſon hath any excluſive Property in them; yet it may be thought that the King has a ſort of Property, at leaſt a *Dominicum directum* in them, as being the *Supream Superior* of all the Lands of *Scotland*.

However, in *Things Common*, as the *Ocean*; the *Light*; the *Sun-Beams*; the *Air*; and the like, no Property can be acquired: For, as to that *Univerſitas Aquarum*, called the *Ocean*, (tho' the King has Right to our narrow Seas, and to all the Shoars) yet it is hard to Conceive how one Sovereign has more Right to it than another; and if the Point of Right were to be tried, it would be no eaſie Matter to find out a proper and competent Judge, for deciding in the Controverſy; and no Man can inhance or appropriate the *Light*, or *Beams of the Sun*, and every Body is as free to breath the *Common Air* as the King.

Diviſion of RIGHTS.

RIGHTS are either *Heritable* or *Moveable*, *Redeemable* or *Irredeemable*, *Legal* or *Conventional*, *real* or *Perſonal*.

An Heritable Right is that which falls to the Heir, and a *Moveable Right* is that which belongeth to Executors.

A *Redeemable Right* is that in which the Equity of Redemption is reſerved; and an *Irredeemable Right* is that as to which there is no Reverſion nor Regreſs.

A *Legal Right* is that which is acquired by Law, and relateth to Judicial Evictions; but a *Conventional Right* is that which is got by Conſent or Voluntary Agreement.

A

A *Real Right* is that which affecteth Lands, Tenements, or the like; but a Perſonal Right is that which bindeth only the Grantor and his Heirs, and doth not Militate againſt ſingular *Succeſſors* (*a*).

Perſonal Rights are called *Obligations*; and becauſe theſe (as ſhall be afterwards ſhown) do ordinarily give Riſe to all the ſeveral Rights above defined, and divided, they Conſequently fall naturally to be treated of in the firſt Place.

And therefore with Regard to Obligations I conceive, that they are generally deduced from one common Fountain, *viz. An immaterial Act of the Mind*, or a *plenary Conſent voluntarily given.*

And thence it follows, that the true Eſſence of an Obligation conſiſts in the Conſent, and that *Stipulations*, *Writings*, and *Oral Expreſſions*, are nothing elſe but the *Indents*, or Evidences of it.

I ſaid only that the *Generality* of Obligations floweth from Conſent, becauſe ſome of them take Riſe from *Things*, *Facts* or *Maleſices* (*b*). And thus if one out of Simplicity pay more than is due, or what was not due at all, he is *Condictione indebiti*, allowed Repetition or Repayment, and that either with, or without the Receiver's Conſent; and if a Man Injure, or commit a Treſpaſs againſt another, he is *ex re ipſa* bound to repair the Injury, or to pay Damages for the Treſpaſs. So that the *res geſta*, or Commiſſion of the Fact, is in ſuch Caſes, as illative of an Obligation, as a plenary Conſent would have been.

I ſaid that a *Conſent voluntarily given*, was in the Nature of the Thing, neceſſary towards the Conſtitution of Obligations, becauſe if the Conſent was elicite by *Fraud*, or extorted by *Force*, it doth infer no Obligation.

For tho' in *Form* the Law ſupports the Obligation, until the Force or Fraud be made appear; yet how ſoon that is inſtructed, the Obligation is declared to have been no Obligation, or to have been Null and Void from the Beginning.

Altho' for Brevity's ſake, I have (and as I hope warrantably) made *Things*, and *Conſent*, the *ſovereign Sources* of all manner of Obligations, yet Obligations and Contracts (*which laſt are nothing elſe but the Conſent*

(*a*) Purchaſers for valuable Conſideration. (*b*) From *Malum & facio.*

of Debitor and Creditor introducing an Obligation) are ſo very many, that they are often deſcribed, without being ever fully and particularly enumerated.

Nor are they leſs Different in their Natures, than they are Various and Singular in their Denominations; and yet the Nature, Import, and Conſequencs of Contracts, are clearly known to Lawyers from their reſpective Denominations, *& vice verſa*, the Names of *Contracts* or *Obligations*, may be likewiſe known from the Import and Conſequences of them.

And tho' ſome Contracts, as wanting peculiar Names, are called *Innominate*, yet their *Nature* and *Import* doth diſtinguiſh, and point them out to be of that Claſs.

Now, as this is the ſhorteſt Way of framing the quickeſt Idea of Contracts, ſo that their *Names* may be truly known from their Natures, and likewiſe that their Natures may at one View be underſtood from their Names, will, as I hope, clearly appear, from the following Suggeſtions concerning ſuch *Contracts as are pendent upon Things*, and likeways with Regard to ſuch other *Contracts* as are *conſtituted by mere Conſent, without the Intervention or Tradition of any Thing.*

The former I ſhall touch under the Denominations of *Mutuum, Commodatum, Depoſitum, Pignus, & Precarium*; and the latter under the Titles of *Emption* and *Vendition, Location* and *Conduction, Society* and *Mandate.*

Borrowing or *Mutuum* (ſo called *quaſi de meo tuum) is a Contract whereof the Subject being a Fungible (d), the Property is transferred, and the Receiver runs the Hazard of it*, becauſe *Quodq; perit ſuo Domino.*

But tho' the ſame Thing borrowed be not reſtored, yet the Equivalent will be ſuſtained as a ſufficient Implement of this Contract; and thus, when a Man borrows 100 Guineas, he is not obliged to reſtore the ſame, but only the like Number of Guineas.

Loan or *Commodatum* (ſo called *Quia Commodo alterius 'detur*) is the *Gratuitous Conceſſion of the Uſe of a Thing*, whereof *the ipſum Corpus* muſt be reſtored.

(*d*) A Thing commonly valued according to its Quantity, as Money, Wine, &c. v. g. one Hundred Guineas is no better than another 100 of the ſame Species.

This Contract differs from *Mutuum* in theſe Particulars, *viz.* That the Subject of it is not properly any *Fungible*; the Property is not transferred; the Lender runs the Hazard, and the very Thing itſelf ought to be reſtored.

And thus when a Man lends a *Cloak* (*f*), his *Watch*, or the like, the Receiver is preciſely holden to reſtore the very individual Thing which he received.

And thence it is likewiſe plain, that how ſoon the Nature of the Thing is underſtood, the Denomination of the Contract doth preſently Occur; and when the Name of the Contract is once diſcovered, Lawyers are ſeldom at a loſs to find out the Nature and genuine Conſequences of it: And the ſame is alſo to be ſeen in the ſeveral Contracts, to be afterwards mentioned.

Depoſitation (*g*) is defined to be a Contract *quo res alteri cuſtodienda datur gratis*: From whence it appears that the Safe-keeping, or Preſervation of the Thing, is all that is deſigned, by the Contract; for in Conſtruction of Law, the Poſſeſſion, as well as the Property of the Thing doth remain with the Deponent.

In Depoſitation, the Depoſitary (or he who receives the Depoſite) is obliged to reſtore the ſame Thing that was left in his Cuſtody, to be gratuitouſly preſerved by him.

But then he who doth Depoſitate runs the Hazard of the Thing, unleſs it were really loſt, by the Fault or Fraud of the *Depoſitary* (*h*).

And tho' this be a Rule in the Civil Law that *Depoſitarius tantum præſtat dolum aut latam Culpam*; yet, by the ſame Law, that Rule is intirely diſpenſed with, in the Caſes of *Nautæ, Caupones, & Stabularii*; *ſo that Inn-keepers, Stablers,* and *Maſters of Ships, are all naturally* liable *in moſt exact Diligence* for preſerving the Goods of their Gueſts, Paſſengers and Strangers.

The *Depoſite* cannot be detained for any Debt due to the *Depoſitary*, unleſs it were for the Expences neceſſarily beſtowed upon the very Thing depoſited.

(*f*) Example in Loan. (*g*) *Depoſitum*, or *Commendatum*. (*h*) He, in whoſe Hands the Depoſitation was made.

And

And the Reaſon why neither *Compenſation* (*i*), nor *Retention* are allowed in this Caſe is, becauſe the *Depoſitary* is *ante omnia* obliged to reſtore the Thing depoſited, that ſo he may Anſwer to his Truſt in the firſt Place.

Nay, ſo far did Point of Honour take Place with the Civilians in this Contract, that the Depoſitary was obliged to reſtore the Depoſite even to a Thief, or a Robber; for without aſking Queſtions, he was bound to reſtore the Thing to the ſame Perſon from whom he received it: And if the Depoſitary, by violating his Truſt, did ſuccumb in the direct Action of Depoſitation, he thereupon was declared Infamous.

Pledge (*k*) is that Contract by which the Creditor gets a Right Conſtitute upon ſome certain Thing for the Security of the Debt due to him.

The Scope of this Contract is to ſecure the Creditor, for *Plus cautionis eſt in re quam in Perſonâ*; and yet the obtaining a Pledge, doth not oblige the Creditor to diſpenſe with the Perſon of his Debitor.

In *Impignorations* the Riſque is upon the *Impignorator*, becauſe the Property of the Thing is ſtill his, and the Receiver has only a Security upon it; and tho' the Receiver muſt reſtore the *Pledge*, yet he is only bound for moderate Diligence, and not *pro Culpa leviſſima*, as to the Preſervation of it.

In ſome Caſes Things are legally Impignorate without either the *Tradition*, or *real Conſent* of the Proprietors. And thus Goods brought into a Houſe are liable to the Landlord for Payment of his Rents; and this Kind of Pledge is called a Hipotheque (from ὑπὲρ *ſuper* & τιθημι *pono*) becauſe the Landlord's Security is placed upon it.

But altho' it might be ſaid that he who brings Goods into a Houſe doth thereby tacitly Conſent, that they ſhould be Impignorate for the Payment of the Houſe-Rent, yet that is only a *Conſtructive*, but not a true real and immediate Conſent.

But where a Thing is Impignorate upon expreſs Condition that if the Money be not paid at a certain Day, the Pledge ſhall not be thereafter recoverable, this is called *Pactum legis Commiſſoriæ in Pignoribus*, and

(*i*) Setting up one Debt againſt another. (*k*) *Pignus.*

is juſtly Reprobate by Law, as being contrary to the common Principles of natural Equity; and therefore by the Practice, the *Impignorator* is allowed a competent Time after the Day ſtipulate, for recovering of his Pledge.

The *Pactum Antichreſeos* (*l*) by which the Creditor is allowed the Uſe and Profits of the Pledge in Lieu of the Intereſt of his Money, was prohibited by the Canon Law, as Savouring too much of Uſury; but yet the ſame was expreſsly authorized by the *Civil*, and is no Ways repugnant to the Genius or Diſpoſition of the *Scotch* Laws.

Precarium (ſo termed *Quia preces adhibuerat*, That he might obtain Poſſeſſion, or the Uſe of the Thing) *is only a Loan of an ignoble Kind*; for it may be called back at the Lender's Pleaſure, whereas ordinary *Loans* do naturally imply a determinate Time, for making Uſe of the Thing lent.

Another Difference lies in this, becauſe *in commodato* the *Lender* can't call for the Thing lent until the determinate Time for the uſing of it be expired, that therefore the Receiver is in it liable for moſt exact Diligence, *& pro Culpa leviſſima*, whereas *in precario*, becauſe the Thing is returnable at the Lender's Pleaſure, the Receiver is therefore only liable for *Dole vel pro Culpa lata*, or for his own groſs Negligence or Fraud, unleſs there had been a *Mora*, or ſome undue Delay in not returning of the *Precarium* after it had been required.

Emption and *Vendition* (*m*) is a *Contract by which ſomething is by the mutual Conſent of Buyer and Seller exchanged for a Price certain.*

It is ſaid that this Contract was originally derived from *Permutation* and *Excambion*, which is only *the Giving, Bartering, or Exchanging one Thing for another.*

However, there are ſundry Differences betwixt them; for in *Vendition* there muſt be a certain Definite Price; but in *Excambion* there is no Price required. In the latter the *Excamber* muſt be the true *Proprietor*, but yet the *Venditions* of Moveables (*n*) are ſuſtained, tho' not made by the real Owners of them. But in the Alienation of Lands, the *Seller*

(*l*) From αντι, *contra* & χρησις *Uſus*; becauſe the Uſe of the Money is oppon'd to the Uſe of the Pledge. (*m*) Buying and Selling. (*n*) Goods, Chattels, or Perſonal Eſtate.

is

is Neceſſarily required to be true Proprietor, or otherwiſe the *Buyer* loſes his Right, as having acquired it *a non habente poteſtatem concedendi.*

Altho' a Price certain be required in this Contract, yet if that Price is proportioned according to the Value of the Thing, as it appeared to the Contractors at the Time of the Vendition, in that Caſe no unforeſeen, nor eventual Augmentation of the Value can have any Influence upon, and much leſs be ſufficient for defeating of their Contract.

By the Principles of the Civil Law (which are in moſt Caſes the cleareſt Conſequences of *Right Reaſon*) the Contract of *Emption* and *Vendition* (*o*) is Conſtitute and Compleated by *mere Conſent*, without any Intervention or Tradition of Things; ſo that when a Man buys a Horſe, the Buyer's Right is eſtabliſhed even before Tradition.

And therefore, if after ſuch *Conſent*, and before *Delivery*, the Horſe ſhould periſh by any Accident, without the Fault or Fraud of the Seller, the Loſs would redound to the Buyer, in reſpect of the Perſonal Obligation upon the Seller to tranſmit his Right, and to deliver the Thing bought.

By the Civil Law an Action once litigated, could not be ſold off, leſt the ſame might, to Defendant's Hurt, fall into the Hands of a Perſon more powerful than the firſt Proſecutor (*p*): But whatever Equity may be in that, there is no ſuch Reſtriction that Obtains in *Scotland.*

Location and *Conduction* is a Contract *bona fide*, whereby one *lets* and another *takes* the Uſe of any Thing for an agreed *Præmium*, or Fee certain.

The Scope of this Contract is not to Transfer the Property of the Thing *Let*, and therefore if it periſh by Accident, the Loſs redounds to the *Locator* (*q*), and the *Conductor* (*r*) is only holden to uſe ſuch moderate Diligence for the Preſervation of the Thing let, as prudent Men uſe to adhibit in their own Affairs.

And hitherto appertain the *Indentures*, execute betwixt *Leſſors* and *Leſſees*, they being only attended with this Singularity, that if after the utmoſt Skill, Application and Induſtry of the *Leſſee*, there be an abſolute Sterility of the Lands *let*, in that Caſe he will be freed from the

(*o*) Buying and Selling. (*p*) Plaintiff. (*q*) Leaſor. (*r*) Leaſſee.

Annual Duty payable to the *Leſſor*, that having been only Stipulate to him in Contemplation of the Fertility and Produce of his Ground; and therefore the ſame ceaſeth to be due, when his Ground can produce Nothing.

By the Nature of this Contract, the Thing *let* ought to be reſtored in good Condition; and thence it proceeds that no *Fungibles*, as Wine, Oyl, or Corns, (*Quorum uſus in abuſu eſt*) can be *Let* nor *Conducted*, becauſe they are ſpent, wore out, and conſumed by the uſing of them.

Society or Copartnerſhip is an Agreement, whereby *Profit* and *Loſs* redounding from the *Joint Stock*, *are Communicable to the Partners proportionally, and according to their ſeveral Intereſts in the Capital Stock.*

This Contract, of its own Nature, only comprehends thoſe Gains which ariſe from the Pains and Induſtry of the *Socii* or *Copartners*; and therefore *Donations*, and what falls to any of the Partners by *Succeſſion* or Deſcent, are not Communicable to others concerned in the *Society.*

By the Nature of *Society*, if either the Proportion of Loſs or Gain be expreſſed, the one is regulated by the other, and therefore the *Societas leonina*, by which one gets all the Gain, the other only incurring Loſs, is juſtly reprobated by Law.

In all *Societies* the perſonal Qualifications of their *Conſtituent Members* are mainly conſidered, and therefore by the Nature of this Contract, the Society is, or may be diſſolved by the Demiſe of any one of the Partners, unleſs the Contrary be provided by Expreſs Paction, or elſe by Statute Law.

Mandate (ſo called a *mandando*) is a *Commiſſion for managing any Buſineſs gratuitouſly.*

And tho' this Commiſſion be granted ſolely for the Benefit of the Employer, yet the Perſon imployed is bound to a moſt exact Diligence in the Execution of the Mandate; and this proceeds upon the perſonal Truſt, and Confidence, that by the Nature of the Thing, muſt be neceſſarily repoſed in him.

If the *Mandate* were given merely upon Account of the *Mandatary* (*ſ*), it could produce no Obligation, as reſolving only into a ſort of

(*ſ*) He to whom the Mandate is given.

Council,

Council, which the *Mandatary* might, or might not follow as he pleaſed.

But in ordinary *Mandates*, the Mandatary is bound to execute the Mandate, according to the ſtrict Preſcript of his Commiſſion, or otherwiſe the *Mandator* will not be obliged to ratifie his Proceedings: And tho' a Mandatary needs not *accept*, except he pleaſes, yet if he once does *accept*, he is bound to execute the Mandate in the preciſe Terms of it.

A Man baniſhed, or whoſe Goods are confiſcated, may effectually give a *Mandate* for preſerving ſuch Goods, as fall not under the *Confiſcation*, and then only a Man's *Civil*, but not his *Natural Rights* are ordinarily confiſcated; ſo that a Perſon baniſhed might either expreſsly revoke a Donation in *Contemplation of Death*, made to his own Wife, or he might give a Mandate to another Perſon for ſo doing, and that Mandate would have the ſame Effect with his direct or expreſs Revocation.

If the *Mandatary* hath once begun to expede a Piece of Buſineſs, as to diſpoſe of a Cargo of Goods, or the like, in Conſequence of his Commiſſion, and thereafter dies before the Thing is concluded, in that Caſe, his Heirs and Executors are bound to proceed in Negotiating, and to bring to a Period, the particular Affair that was ſo begun.

But then, if nothing was begun, or if all that was begun be fairly finiſhed in the preciſe Terms of the Mandate, in that Caſe the ſame is extinguiſhed either by the *Revocation* of the Employer, or by the *Renunciation* of the Perſon employed, or yet by the Demiſe of either the one or the other.

However, there is this much ſingular in Mandates, that whereas other Contracts do introduce a conſtant *irrevocable Obligation*, yet all ordinary Mandates are naturally *revocable*; and tho' the Thing be not intire, *yet even that* doth not in ſome Caſes, hinder the *Revocation* of a Mandate. And thus, if *Titius* in Name, and in Virtue of a Mandate from *Sey'us*, ſhould bring on, and ſettle a Treaty of Marriage, with the Daughter of *Sempronius*, yet I doubt *Sey'us* repenting, might recall his Mandate, or at leaſt would not be holden to Celebrate Marriage in Conſequence of it; and ſince Matrimony once conſtituted cannot be

eaſily diſſolved, it were hard to embarraſs the Liberty of Mankind, or not to allow a free Choice as to the Conſtitution of it.

A Contract entered into by the Maſter of a Ship for Out-rigging his Veſſel in a foreign Country is Obligatory, upon the Merchants, Owners, or Freighters of that Ship; and Bargains made by *Shopkeepers*, in relation to the Goods, wherewith they are intruſted, do oblige the real Proprietors of ſuch Goods, and it is in Conſequence of a tacit kind of Mandate that the Exercitors (*t*) of Ships and *Prepoſitors* (*u*) are thus effectually bound by the Contracts entered into, by the Maſters of Ships and Inſtitutors (*x*).

Tho' what has been ſaid concerning the Perſonal Obligations and Contracts before-mentioned, may, in ſome Meaſure be thought ſufficient, for anſwering the Scope of this Paper, *which is only to ſuggeſt a tolerable clear Idea of the Nature of the various Things treated of*, leaving the Reader to make ſuch further Improvements and Obſervations thereupon as he ſhall think convenient; yet, ſuch as deſire more ample Deſcriptions of theſe Contracts, are remitted to the numerous Volumes, and whole Body of the Civil Law, where they will find more ſaid of them, than there is Room here to mention, and which, indeed, would unneceſſarily inhance a great deal of more Room, than all this Paper doth contain.

Beſides, theſe Contracts, whoſe Names and Natures, are beſt collected and underſtood from the Books of Civil Law; the other moſt ordinary and remarkable Perſonal Obligations uſed in *Scotland* are *Bills* and *Bonds*; for upon theſe Summary Execution is allowed to paſs againſt *Perſons*, *Lands*, and *Goods*; whereas *Promiſſory Notes*, *or Miſſive Letters* are not allowed that Privilege until a Decreet (*y*), or Sentence of a Judge be firſt recovered upon them.

Bills of Exchange.

SOME Lawyers define a *Bill of Exchange* to be a *Contract, Juris Gentium, & bonæ fidei, which is moſt benignly interpreted*; and yet at the ſame Time they make it a *Species* of *Mutuum* that is uſed among Merchants,

(*t*) *The Conductors*, or Freighters. (*u*) He that hath the Property of Goods, or is Chief in Office. (*x*) *Factors or Shopkeepers.* (*y*) Judgment or Award.

altho'

altho' that Kind of Contract ought always to be underſtood in the ſtricteſt Terms.

But without tracing the Subtilties uſed by Lawyers upon that Subject, it would ſeem that a direct Idea of the Nature of a *Negotiable Bill* may be, in a great Meaſure, conceived from the ordinary Tenour of it; and from thence it doth appear, That the *Date*, *Addreſs*, and the *Drawer*'s Order *to pay a particular Sum, at a Day and Place certain, to himſelf, or to the Order of any other Perſon, and the Debitor, or the Perſon Drawn upon, his Acceptance of that Order*, are the only Conſtitutive and Eſſential Ingredients, of which Bills of Exchange are formally compounded.

But becauſe no *Obligations* are more Productive of *Law Debates* than theſe Bills are, and ſince ſome Merchants do too frequently deal in them, as Children do with Figures or *Numbers*, without knowing their Import, or the Reaſon of their Operations; or as *Empiricks* practice in Medicines without knowing their *Qualities*, or any Thing about the natural Effects of them, it therefore may not be amiſs in a ſummary way, to ſubjoin a few Obſervations concerning theſe Bills of Exchange.

But antecedent thereto, it is fit to know, that the Caſh or Thing given for a Bill is called *Value*: Now the *Value* and the *Bill*, are the productive and efficient Cauſes of one another; and where more or leſs is given for a Bill, than its own Contents, that Difference (be it leſs or more) is called *Exchange*; but when only a Sum that is exactly Equivalent to the Contents of the Bill, is payed for it, the Exchange is then ſaid to be at *Par*.

Re-exchange differs from *Exchange*, and yet it is not *double Exchange*; for *Re-exchange* ſignifies only the particular *Odds*, or *Difference* betwixt the Exchange of the firſt Draught, and the Exchange paid for the *Redraught*, the Exchange of the latter being ordinarily much higher than that of the former.

And tho' Exchange is ordinarily tranſacted, betwixt the Drawers and Receivers, or Remitters of Bills; yet in Foreign Countries, Ex-

change is alſo tranſacted, a Price paid, or a valuable Conſideration is given, on Account of the ſimple Permutation or Excambion of one Coin, or Species of Money for another; and tho' in *Britain* there is no legal Difference of Monies, yet in moſt Foreign Countries, the conſtructive or extrinſick Value of *Bank-Money*, is reckoned much higher than that of the ordinary Current Coin.

And *now* with regard to Bills themſelves, it is Obſervable in the firſt Place, that *Bills of Exchange* are ſaid to have been originally invented by the *Jews*, as the eaſieſt Method of remitting to them ſuch Money, as was left in the Hands of Confident Perſons or Truſtees, upon their being expelled *France*, and obliged to retire into *Lombardy*; but be that as it will, it is certain that in Conſtruction of Law, Bills of Exchange are always to this Day conſidered as *Bags of ready Money*.

2. Such is the Favour of Commerce, and ſuch Expedition it requires, that Bills of Exchange are ſuſtained, altho' they want the neceſſary Solemnities required to other Obligations, *as the Writer's Name inſert, and Witneſſes Subſcribing*.

3. By the ſame Reaſon that *Bills* want Writer's and Witneſſes Names, it is plain that they were never deſigned to be permanent Securities, but only to paſs from Hand to Hand, as if they were Bags of Money.

And certainly it would be of dangerous Conſequence, to place the greateſt Securities upon one ſingle *Subſcription*, or to find vaſt Eſtates carried off by the ſiniſtrous Falſification of one ſingle *Name*.

4. Upon the ſame Ground it is, that Bills of Exchange loſe their *Privileges* as *ſuch*, unleſs they be Proteſted, or Diligence be done upon them within ſix Months.

Theſe ſix Months are computed from the Term of Payment, where Bills are duly honoured, and from their Date, where due Acceptance is refuſed; but tho' this holds in *Scotland*, yet it is not ſo in every other Country.

Bills of Exchange have ſeveral other Privileges beſides *parata executio*, and that of their being Suſtained without Witneſſes. As 1. That they ought to be interpreted *ſecundum Jus gentium*, and according to the

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Cuſtom of Merchants, and not by the ſtrict and rigorous *Preſcripts* of the Municipal Laws of particular Countries.

2. Tho' it be a Rule in the Civil Law and in Equity, That *Nemo plus Juris ad alium transferre poteſt quam ipſe habet*; yet if a Bill is *indorſed* for an *adequate Value*, *Payments* made to the *Indorſor*, will not be Suſtained againſt the *Indorſee*, unleſs ſuch Payments were clearly marked upon the Bill itſelf; neither will *Compenſation* (*a*) upon any Debt due by the Indorſor, to the Acceptor or Debitor in the Bill, be ſuſtained againſt an *Onerous Indorſee* (*b*), altho' in moſt Countries, ſuch Compenſation is always allowed in other ordinary Obligations.

3. If the Debitor in a Bill is ſued in *Scotland*, the Plaintiff has no Occaſion to prove his Debitor's Subſcription, for the Bill is ſtill preſumed to be Genuine, until the Contrary be made appear; and certainly it would be a great Hindrance to Commerce, to neceſſitate Creditors to lie out of their Money, until Commiſſions were ſent *to*, and returned *from*, the outermoſt Parts of *Europe*, or even of the known World, for proving of their Debitors Subſcriptions.

Nor ſeems there to be ſo much Security in the proving of Writes as is imagined, for they are often proved by Perſons who know little or nothing that is certain about the Matter; and if a Man will be ſo wicked, or unwiſe as *knowingly* to uſe a falſe Write, he may Poſſibly find ſuch as know nothing of the Matter, and who, nevertheleſs, upon Faith of the Uſer's Affirmation, as well as from the faint Reſemblance which the Counterfeit bears to the Genuine Subſcription, will think themſelves ſafe enough to Swear, *That they believe the Subſcriptions are ſuch a Man's*, ſince they may reaſonably believe *that* rather than think otherwiſe, until the Contrary be made appear to them; and, no doubt, there are Inſtances where falſe *Wills* have, to outward Appearance, been fairly proved.

However, this Convenience of not obliging Creditors to prove their own Evidents is not Peculiar to Bills of Exchange alone; for in *Scotland Quiſque preſumitur bonus*, until the Contrary be proved; and there are ſo many Solemnities required towards the Conſtitution of Obliga-

(*a*) Setting up one Debt againſt another. (*b*) An Indorſee for a valuable Conſideration.

tions as render the *Falſification* of them almoſt impracticable; and therefore all Obligations do formally ſubſiſt as true Deeds until they can be legally reſcinded; for as to them *Omnia præſumuntur ſolenniter Acta*, until the Contrary be made appear.

5. *Uſance* is a *French* Term uſed by *Banquiers* for expreſſing the Period of Time at which Bills are payable: And in *France* ſingle *Uſance* is only equiparate to 30 Days, but in *Great Britain* it is taken for an exact Month, whether the Month contains more or leſs than 30 Days: And the like Computation holds as to *double* or *triple Uſance*, &c.

6. And here it is Obſervable, that as *Bills* ought not to be permitted to lie long Dormant, without doing Diligence upon them, ſo neither ſhould they be Drawn payable at a Term too remote; for if the Term of Payment were three or four Years after Date, in that Caſe the Bill would not only loſe the Energy, Force and Privilege of Bills of Exchange, but likewiſe the *long Term* of Payment might, in ſome Caſes reſolve into a Preſumption, ſtrong enough for voiding the Bill itſelf, as to all Intents and Purpoſes.

7. Bills for the Delivery of *Meal*, *Salt*, *Wheat*, or other *Fungibles* (*c*), have not the ſame Privileges that are allowed to other Bills.

Bills of Exchange are ſuppoſed to be drawn for Value; and therefore in *Scotland*, and by the Nature of Bills, tho' the *Value* be not expreſſed, yet it is ſtill preſumed; but it may be queſtioned if there be any Place for that Preſumption, by the Common Law of *England*.

8. All Drawers, Acceptors, and Indorſors, are ordinarily liable *in ſolidum*, or for the full Contents of the Bill to the Creditor, Porteur, or Poſſeſſor of it.

9. I ſaid that *Acceptors*, &c. are ordinarily liable *in ſolidum*, becauſe in ſome Countries a *qualified Acceptance* is allowed; but in others, tho' a Perſon Accepts with a Quality, yet he is ſimply liable in Terms of the Draught, and in *France* a *qualified Acceptance* is conſtructed a Refuſal.

10. *Verbal Acceptances* are not allowed in *Scotland*, but yet a Perſon would be there ſubjected upon his *Verbal Acceptance*, if the ſame was given in any Country *where Verbal Acceptances* are allowed, and that proceeds

(*c*) *Such Things as are Eſtimate according to their Quantities, and are not ordinarily Noticeable, nor eaſily diſtinquiſhed in their individual or particular Bodies.*

upon

upon this Ground, that Bills of Exchange are to be regulated according to the Cuſtoms of Merchants, and the Laws of Nations.

11. Taking of Annual Rent was diſcharged by the *Canon Law*, as being Contrary to the Nature of the Thing, Money being barren in its own Nature; but yet Bills bear Annual Rent from their Date if no Acceptance is given, and from their Term of Payment, where the Bills are duly honoured; and this for the Good of Commerce is allowed without any Paction, tho' contrary to the Nature of the Thing, and altho' there be no expreſs Clauſe nor Stipulation for Annual Rent in the Bill.

12. *The Julian Account* is followed in *Britain*, and in ſome other Countries, and is called *Old Style*; but in *France* and *Spain*, &c. *The Gregorian Calendar* is the *Standard*, and is termed *New Style*, and eleven Days are the Difference betwixt the Two; ſo that the firſt Day of the Month *by the Old*, is the 12th Day of it by the *New Style*; and tho' Lawyers ſeem not to be agreed as to the Queſtion, *Whether a Bill ought to be paid according to the Style of the Place where it is Drawn, or according to the Style uſed in the Country, where it is payable?* Yet, it is very probable, that the former ought to be the Standard, becauſe all Contracts fall naturally to be regulated by the Laws and Cuſtoms of the Place where they are entered into; and he who accepts a Bill, doth tacitly acquieſce in, and ſubmit himſelf to the Regulations of the Place where ſuch a Bill was Drawn, or if he is not inclined to do that, he ought not to have accepted the Draught: And by the Cuſtoms of *England*, Payments are honourably made, great Regard being had to the Intention and Meaning of the Drawer, as well as to the Cuſtoms and Style uſed in the Country where he reſides; and it is ordinarily preſumable that the Drawer computes the Time for the Payment of his Draught, according to the Style uſed in his own Country.

13. The Porteur of, or Creditor in the Bill, ought to be moſt exact, and pointed with Regard to the Negotiating of it, and to write punctual and clear Advice as well concerning *Proteſts* and *Non-Acceptance*, as with reſpect to the not *punctual Payment* of the Bill; for if in the Interim Inſolvence happen, or if other Leſion can be qualified thorough his Omiſſion, Fault or Negligence, he will be thereby precluded

from any Recourſe againſt *Indorſors*, or *Drawers*, who otherwiſe would been *ſubſidiary* liable to him, for the Total Contents of his *Bill*.

14. Tho' the Draughts of Minors, being *Factors*, are not Obligatory upon themſelves, yet they may be made effectual againſt their Conſtituents.

15. In the laſt Place, with Regard to Bills of Exchange, it is obſervable that tho' ordinarily there are Three or more Perſons concerned in them, *viz.* a *Drawer*, an *Acceptor*, and a *Creditor* in the Bill; yet ſometimes theſe Three are reduced to Two, and in that Caſe the *Drawer* and *Creditor*, are one and the ſame Perſon, and this doth frequently happen in the Caſe of *Inland Bills*.

But then in ſome Countries theſe *Inland Bills* have not the ſame Privileges that are allowed to *Foreign Bills*, and this partly happens upon Suppoſition, that Commerce is not ſo directly concerned in the former, as in the latter; and partly to prevent Bonds, and all other Securities from being reduced into *Inland Bills*; and doubtleſs, theſe *Inland Bills* fall more naturally to be limitted and regulate by the Laws of any particular Country, or the Municipal Statutes thereof, than *Foreign Bills* ought to be.

And therefore ſuppoſing that *in re Mercatoria*, a Bill were Drawn in *France*, or in any Foreign Country, upon a Merchant of *London*, payable to the Drawer's own Correſpondent or Order, ſuch a Bill with reſpect to the *Drawer* and *Acceptor* is plainly a Mandate imperatively given, as is clear from the very Words of the Bill, *Pay to ſuch a Man or Order*, &c. And yet betwixt *Acceptor* and *Drawer* it is truly a kind of *Mutuum*; for the Acceptor is ſuppoſed to have borrowed and received the Value of his Acceptance; and betwixt the *Drawer* and his Correſpondent, or Creditor in the Bill, it participates very much of the Nature of a *Depoſitum*; for in Conſtruction of Law, the Bill is a Bag of Money intruſted by the Drawer to be re-delivered at another Place; and as by the Civil Law, in *Depoſitation* (as is before obſerved) no Compenſation was allowed; ſo neither would it be Suſtained againſt the Correſpondent or direct Creditor in the ſuppoſed Bill.

Now, as this *ſuppoſed Bill* doth participate of the ſeparate and diſtinct Natures of ſundry Contracts, according to the ſeveral Views in which

it may be conſidered, ſo with reſpect to the common Nature and General Deſign of Bills, and alſo with regard to all Perſons concerned in them, a *Bill of Exchange* may be fitly conſidered as a Contract, *Juris Gentium & bonæ fidei, falling naturally to be interpreted ſecundum Arbitrium boni Viri*; and as ſuch in all dubious Caſes, it ought to be regulated, applied, and explained according to the firſt and pureſt Principles of *Right Reaſon, Equity* and *Juſtice.*

From all which I conclude that ſuch as reſolve to be enabled fairly and clearly to ſolve themſelves, or others, concerning the various Doubts and Queſtions, which daily ariſe from that little, but *Important Schedule* called a *Billet de Change*, ought firſt to underſtand the Import and Conſequences of the ſeveral Contracts, of whoſe Nature it participates; and for that Reaſon Bills naturally ſucceeded to this Place in my Paper, after their *Correſpective* (*d*) *Contracts* had been immediately before explained.

B O N D S.

A Bond is the firmeſt and moſt permanent Perſonal Security that is known in *Scotland.*

The Eſſentials of it are *the Deſignation of Debitor and Creditor, the Sum, the Term of Payment, the Penalty (which is one Fifth of the principal Sum) a Clauſe* (*e*) *for Annual Rent, a Clauſe conſenting to the Regiſtration, and that Execution may paſs in Courſe*; *and laſtly, the Clauſe of Subſcription* in which the Date is inſert, and the Writer and Witneſſes are particularly deſigned.

Such Bonds are wrote upon ſtampt Paper in the *Scotch* Style, and not in *Latin*, but they ſubſiſt and ſtand good for the Space of forty Years; and the Clauſe of Regiſtration doth ſuperſede the Neceſſity of any Warrant for confeſſing Judgment upon him.

If Annual Rents are Annually paid, or if Execution be done upon the Bond, it will never loſe its force nor expire; for *Preſcription* runs only from the laſt Act that is done upon the Deed; but more of this in its proper Place.

(*d*) *Cor-relative.* (*e*) Proviſion.

But

But altho' theſe Obligations do indeed proceed upon *expreſs Conſent*, and the *explicite Will*, of the Grantors, yet there are many others which are only introduced by a *tacit*, *preſumed*, or *Conſtructive Conſent*; and hitherto appertain the *Quaſi Contractus*, all Acts of Homologation, and the *Innominate Contracts of all the various Kinds*; *as*, *do ut des*, *do ut facias*, *facio ut des*, *facio ut facias*.

For clearing of all which, in Order as they lie, the following reſpective Examples are offered, *viz.* 1. That tho' there be no Marriage Settlement, yet there doth inſue *a Communion of moveable Goods* betwixt Husband and Wife, and that in Virtue of a *Quaſi Contractus*.

And 2. If one *Willingly pays* a Part of a Controvertible *Debt*, or Annual Rent for it, the Bond, or Judgment upon which that Debt is founded, is thereby *Homologated* (*g*), and conſequently becomes effectual againſt the Payer, as to all Intents and Purpoſes.

3. Suppoſing *Titius* put into the Hands of *Mevius*, any ingenious Piece of Mechaniſm, *as a Ring curiouſly Set with the rareſt Diamonds*, *or a Picture dexterouſly* Drawn, and *approaching even unto Life*, that ſo *Mevius* might View and Contemplate the Curious Workmanſhip of the Ring, as well as the Beautiful and Bold Strokes of the Picture; yet that being once done, *Mevius* would be certainly holden to reſtore both *Ring* and *Picture*, and that in Conſequence of an *Innominate Contract*, altho' there had been no expreſs Stipulation paſt betwixt him and *Titius* for that Effect.

And with reſpect to Perſonal Obligations in general, it is very Noticeable, that if a Man obliges himſelf to pay, or perform that which is not in his Power, or is abſolutely impoſſible for him to do, in that Caſe he is liable for the Damages and Expences of the Party with whom he Contracts; for *Loco facti impræſtabilis Succedit Damnum & Intereſſe*.

But yet (before winding up the Matter of Perſonal Obligations) it is alſo neceſſary to Remark, *That no Body can be validly obligated to do that which is utterly impoſſible for all Mankind*, *to tranſmit the Property of Things that are not in Commercio*, *nor yet to do that which in its own Nature is either baſe*, *treacherous*, *unlawful or unjuſt*; for theſe Things are ſo far *Contra bonos*

(*g*) Owned.

Mores,

Mores, and ſo clearly repugnant to all the Principles of Right Reaſon and *Natural Equity*, that it is Self-evident, they can never be the Subject Matter of any legal or effectual Obligations.

From Perſonal Obligations I proceed to *real Rights*, but as theſe laſt do relate to Feus (*h*), it is Neceſſary in the Entry to open a little of the Nature of them.

And for that Purpoſe it is fit to know, That in the Reign of *Juſtin* the 2d, (*Anno Chriſti* 568) *Italy* was over-run by an Irruption or Inundation of Confederate *Lombards*, *Hunns*, *Francs*, and *Saxons*; and theſe, about that Time, firſt introduced the Feudal Law into the Weſtern Empire, and from thence (having been a little tinctured with the Civil Law) it was afterwards diffuſed thorough moſt Parts of *Europe*.

This being the Caſe, it is eaſie to conceive what then came to paſs, *to wit*, that theſe *Invaders* did Reward and Encourage the *Barbarous Bravery* of their Soldiers, by diſtributing amongſt them the Lands and Spoil of their Enemies, and the Lands ſo diſtributed were called *Feus*, from the *Latin* Word *fides*, becauſe ſuch Rights naturally imply a certain kind of *Fealty*.

And therefore I define *Feudum* or a *Feu* to be a *Remunatory Donation of Lands, upon Condition of future Fidelity and Reſpect*.

And ſuitable to this Definition, ſome there are who will have each Letter in the Word *Feudum* to have originally ſuggeſted a correlative Word in the Feudal Oath, uſed to be taken by Vaſſals, or Feuers at the Time of their Inveſtiture, as the ſame is comprehended in the following *Verſicle*, *Fidelis ero vere Domino vero meo*.

Feus being thus derived and defined, I next proceed to the moſt remarkable Diviſion of them; *Namely*, That of (*i*) *Simple-Ward*, *Tax-Ward*, *Black-Ward*, and ſuch as are holden *Feu*, *Blench*, *Burgage*, or *in Manum Mortuam*.

Where Lands are holden by a *Simple-Ward Tenure*, the Superior (*k*) has Right to the *Mails* and *Duties* (*l*) of the *Ward-Lands* during the Minority of his Vaſſal.

But then the Superior is in the *Interim* obliged to entertain the Minor, if he have not *aliunde* to Aliment himſelf.

(*h*) Fiefs. (*i*) *Tenures*. (*k*) Over-Lord. (*l*) Rents and Profits.

And the Feudal Reaſon of this is, that *Ward-Lands* having been originally given for Military Service, the Superior had therefore Right to the Rents and Profits, becauſe a Minor Vaſſal was preſumed incapable of ſerving him in the Wars.

But if the Vaſſal be a Female, this Caſualty laſts no longer than the 14th Year of her Age, becauſe ſhe may then marry a Husband that is capable of ſerving the Superior.

Another Thing that is very ſingular and peculiar to *Ward Holding* is, that if the Vaſſal without the Superior's Conſent, ſhall Sell or Diſpone the Major Part of *Ward-Lands* to any Perſon except his own apparent Heir, who is *alioqui Succeſſurus*, in that Caſe the whole *Ward-Lands* return to the Superior, and that by Reaſon of a Feudal, and Conſtructive Ingratitude in the Vaſſal, who ſhould not have ſold the Lands without Conſent of the Superior, ſince he is preſumed to have got them Gratuitouſly from him.

And if this Vaſſal Marries without the Superior's Conſent, the Superior has Right to the ſingle *Avail (m)*; and if he offers him his Equal for a Wife, and he Marries another, the Superior gets the *double Avail* of Marriage *(n)*. But the ordinary Modification for the *ſingle Avail* is two Years Rent, and for the *double Avail* three Years Rent of the Vaſſal's free Eſtate.

The *Feudaliſts* ſay, that this Caſualty was introduced to prevent the Vaſſal's marrying a Wife out of a ſtrange Family, who might be an Enemy to the Superior, and this Caſualty is ſometimes due in other Tenures, as well as *Ward Holdings*.

A *Taxt-Ward Holding*, is where the Caſualties are taxed or reſtricted to a particular Thing or liquidate Sum.

But in *Crown-Lands*, *Taxing* has, for political Ends, been ſometimes refuſed, as tending to leſſen the Dependence of the Subject upon the Sovereign.

If *Titius* holds Ward of the Crown, and *Seius* holds ſimply Ward of *Titius*, this is called *Black Ward*, or Ward upon Ward.

Feu-holding is that wherein the Vaſſal by his Charter is obliged to pay Yearly a certain Sum of Money, or a particular Quantity of Victual, to his Superior in Name of Feu-Duties, *Nomine feudi firmæ*.

(m) Value of the Tocher. (n) Double of the Tocher.

And by the Feudal Law, if this Feu-Duty was unpaid for three conſecutive Years, the Feu returned to the Superior; but there is ſo much of the above-mentioned *Lex Commiſſoria* (*o*) in this, that in *Scotland* the *Irritance* muſt be judicially Declared, and in the Courſe of that Proceſs of Declarator, the Vaſſal is always allowed a competent Time for purging of the ſame.

Blench-holding, is where the Vaſſal is only holden to pay an eluſory Duty, as a *Roſe* yearly, or a *Bow* and an *Arrow*, or the like, *Nomine Albæ firmæ*, and merely as an Acknowledgment; and this is not always due, nor exacted becauſe the Charter bears *ſi petatur tantum*.

Burgage-Holding is where Cities or Towns being erected into *Burghs Royal* do hold, and have their Lands holden of the Crown for the Payment of any particular Duty or Service; and the common Duty ariſing from this Tenure is only *Watching* and *Warding*.

But there is a material Diſtinction betwixt *Burgage-Holding*, (or Lands holden *in libero Burgagio*) and ſuch Lands as are only holden Feu of the Burgh; for, as in theſe the paſſing of Infeftment, or the Manner of entering Vaſſals are very different; ſo in the latter the liquidate Feu-Duties are yearly payable, as in other Feu-Holdings.

Lands holden *in Manum Mortuam*, or *in Mortmain* (as the Word implies) are ſuch as in Conſtruction of Law, are dead, or loſt to the Superiors; for being originally mortified to religious Houſes, Convents, or other Societies, the Fief was always full, becauſe the Society never died, and ſo the Feu could never revert to the Superior, nor afford him *Non-entrie Dueties*, nor any other of the Caſualties, that fall to be immediately explained; for ſuch Lands were in the Primitive Times doted and bequeathed for Pious Uſes, and *pro precibus & Suffragiis*, or for Prayers and Supplications to be daily offered unto Heaven in behalf of the Donors; *and that the Souls of the Faithful departed*, might through the Mercy of God Reſt in Peace.

Non-Entry is that Caſualty of Superiority, whereby upon Death of the Vaſſal, the Superior (after obtaining Declarator) has Right to the Mails and Duties of the Lands, until the Fief be made full, or until the Heir of the Vaſſal is entered.

(*o*) An Exception (or Irritance) in any Contract which not being fulfilled, the Bargain is void.

For Feus being originally given for Military Service, when the Fief becomes Vacant, by Death of the Vaſſal, the Law allows the Superior a *Retractum feudalem*, or to have Recourſe to his own Feu, that he may therewith provide himſelf of a Vaſſal, that is willing to undergo the Service; for the Vaſſal lying out unentered, is ſuppoſed to be Contumacious in that particular.

When the Heir of a Vaſſal thinks fit to Enter, he pays an Acknowledgment to the Superior for relieving the Lands from him, they having fallen into his Hands by the *Non-Entry*, and therefore this Caſualty is called *Relief*, and it varies in the Sum or Quantity, according to the different Manner of Holdings.

When a Perſon fails to pay his Debt, or to perform his Covenant, he is denounced Rebel, and put to the Horn (*p*), and from the Date of this Denunciation the King has Right to his Moveables, Goods and Chattels; and if the Rebel continues a Year and a Day at the *Horn*, without being releas'd, he is, *fictione Juris*, conſtructed to be civilly Dead, and as ſuch is incapable of ſerving his Superior; and therefore the Superior gets the Rents and Profits of the Rebel's Lands during the Vaſſal's Life, and will likewiſe be intitled to any Temporary Rights to which the Vaſſal had Right, for all the Days of his own Life; the former of which Caſualties (*viz.*) That which falls to the King is called *ſingle Eſcheat*, and the latter is termed *Life-rent Eſcheat*, and both of them being apparently Rigorous and Exorbitant, are conſequently moſt unfavourable in the Eye of the Law.

For here it is obſervable, that all *Feudal Irritances*, and rigorous or exorbitant Penalties are, and ought to be moſt ſtrictly interpreted, becauſe the Reaſons upon which they were originally introduced are now ceaſed.

As for Inſtance, tho' Feus (as has been already noticed) were originally Donations, yet *now* (both at private and publick, or Judicial Sales) they are bought and ſold for adequate and valuable Conſiderations, and therefore ſince *Feuda ad inſtar Patrimoniorum redacta ſunt*, it is a Conſequence that the Rigour of the *Feudal Cuſtoms* ought to be mitigated; and thence it proceeds that Penalties and *Feudal Irritances* are, for the moſt part reſtricted or evaded upon certain Niceties in the

(*p*) Outlawed.

Form,

Form, or ſome Subtilties in the Law, which are ordinarily laid hold upon by Lawyers, in the Courſe of their Practice.

Next to the *Feudal Caſualties*, the Burdens affecting Feus fall naturally to be explained, and theſe are either *Teinds* or *Servitudes*.

Tithes, Advowzens, Patronages.

TITES and *Patronages* have in *Scotland*, ſince the Reformation, been ſo Metamorphoſed (and *Proteus-like* turned into ſo many different Shapes) reſtrained, *aboliſhed* and *revived*, that it is not eaſie, in few Words, to reconcile the preſent *Scotch Doctrine* touching theſe Particulars, to the ancient Learning with Regard to that Subject.

Tithes are by ſome reckoned the bare Effect or *Superſtitious Offspring* of *Epiſcopal Tyranny*, and *Patronages* (*r*) (as being the Invention of *Popiſh* Politicians) are apparently incompatible with the Purity of the *Scotch Kirk*.

But when *Patronage* firſt begun is uncertain; ſome ſay that it preceded Chriſtianity, or at leaſt that it was antecedent to the *Incarnation*; but thus much is generally agreed upon, that after the Plantation, or Deſemination of *Chriſtianity*, there were no Churches in *Scotland* without *Patrons*, *excepting the Patrimonial Churches of Prelates*, or common Churches which were ſerved by Prelates, Monks, or by Perſons appointed by them, and their Chapters.

For Patrons were then reckoned the Benefactors of *Chriſtianity*, and it was their Building and Endowing of Churches that intitled them to be Patrons.

And thence it came to paſs, that Chriſtian Churches having been ordinarily Built, either out of the Pope's Patrimony, or by his Authority, *His Holineſs* (before the Reformation) was therefore in all dubious Caſes conſtructed to be *Patron*.

Patrons had many ſplendid *Privileges*, *as the Preſentation of Incumbents, and the Prayers of the Church, daily put up for them and their Families.* They were alſo intitled to be alimented out of the Church *Benefice*, in Caſe their Neceſſities ſhould require it; and to this Day Patrons

(*r*) Advowzens.

have, even in *Scotland*, *a Right of applying vacant Stipends*, or *Tithes for any pious* Uſes *within the Pariſh* (*r*).

Tithes of Old were uſed as pious Oblations, or rather as *Immolations* (*ſ*); and thus *Jacob* when courting of *Laban*'s Daughter, vowed a *Vow to the Lord his God*, that if he would be with him, he would ſurely give a *Tenth* of all, that the Lord ſhould give him; and the *Grand Patriarch Abraham*, upon his being Bleſſed by *Melchizedeck*, Prieſt of the Moſt High God, actually gave him Tithes of all the Spoils of the vanquiſhed Kings, which *Abraham* and his Servants had ſmote; and as *Tithes* were expreſsly authorized by the Laws of *Moſes*, ſo it is ſaid in the New Law (*t*), *That the Sons of Levi who receive the Office of Prieſthood, have a Commandment to take Tithes*: And it being expreſsly ſaid (in the 27th of *Leviticus*) *That the Tenth ſhall be holy unto the Lord*: Upon theſe and the like Conſiderations, Tithes were generally holden to be *Juris Divini*, and are therefore commonly defined to be *that ſpecial Proportion, or Quota of our Rents and Goods lawfully acquired that belong to God, for the Maintenance of his Service.*

From this Definition it appears, that *Tithes* are rather a Burden upon the *Fruits*, than upon the *Feus*, that is to ſay, They are *Debita fructuum, ſed non Debita fundi.*

The moſt remarkable Diviſion of them is that, whereby they are divided into Perſonal Tithes which ariſe from a Man's own Trade, or Perſonal Induſtry, *prædial*, which ariſe from the natural Produce of Lands, and *mixt*, which ariſe from the Profits or Improvements which Men make upon Lands, by their perſonal Skill and Induſtry.

They are alſo divided into *Vicarage* or *local Teinds*, which are paid out of inconſiderable Things, as Lambs, Calves, or the like, according to the Cuſtom of the Place, and *Parſonage Teinds*, which are payable out of *Corns*; and the Parſonage-Teind is conſtructed to be the fifth Boll of the Heretor's (*u*) free Rental.

All the Lands of *Scotland* are ſubject to the Payment of Parſonage-Teinds, excepting *Glebes* (ſo called from *Gleba terræ*) being 4 Acres of

(*r*) Paroch. (*ſ*) There were three Kinds of Sacrifices in the old Law, *viz. Victims, Immolations, and Libations*; *now the Immolations* were compoſed of the Fruits of the Earth, as Bread, Salt, Incenſe, Tithes, and the like. (*t*) Hebrews 7th and 5th. (*u*) *Proprietor.*

Land

Land allotted for the Uſe of him that ſerves the Cure, and which do ordinarily lie contiguous to the Church; and excepting alſo ſuch Lands, as were feued out before the *Lateran Council*, and ſuch Lands as belonged to the *Ciſtertians* or *Bernardins*, a religious Order anciently famous for good Diſcipline, Piety and Mortification; and likewiſe ſuch Lands as were doted to the *Hoſpitallers*, or *Knights of St. John*, a religious and military Order conſpicuous for its Chriſtian Zeal, and Bravery in the Conqueſt of *Jeruſalem*, and for defending Pilgrims, or Chriſtian Viſitors from the Inſults or *prædonious* Invaſions of Infidels and *Saracens*.

SERVITUDES.

THERE being many different Kinds of Servitudes, their Nature is better underſtood from the ordinary Diviſions, than from any Definition that can be given of them.

However, I take a *Servitude* to be *a Right of having, or uſing any particular Intereſt, in what belongs to another, contrary to the common Rules, by which every Man is allowed the abſolute and free Uſe of his own.*

They are divided into *real* and *perſonal Servitudes*. The former obtains where one Thing ſerves another; and the latter takes Place, where Things are made directly ſubſervient to Perſons.

Real or Predial Servitudes may be ſaid in a *Metaphyſical Senſe*, to be neither *in bonis, nec extra bona*, not the *former* as being incorporeal, and becauſe they are neither Lands nor Parcels of them; and yet without Lands they can't exiſt of themſelves, as being only Qualities or Accidents of the *Feu*.

Nor yet the latter for *being Accidents of the Feu*, tho' they directly reſpect the Lands, yet by Conſequence they indirectly appertain to the Proprietors thereof, and ſo are not *extra bona*.

But waving ſuch Subtilties, *Real Servitudes* are fitly divided into *Rural* and *Urban*, or City Servitudes.

Rural Servitudes are *Iter, actus, via & Æquæductus*; and the Power or Privilege of caſting *Faill* or *Divot*, *Common Paſturage*, and *Thirledge*.

By all which is underſtood a Liberty or Privilege of *paſſing*, of *driving Carts or Wains*, of having an *Highway*, and of *drawing Conduits* tho-

thorough the ſervient Lands, and likewiſe of *digging Turf*, and *paſturing* or feeding of Sheep, Oxen, or other Cattle upon them; and laſtly, of having them *Thirled*, or a Privilege of having the Leſſees or Poſſeſſiors of them obliged to pay certain ſmall Quantities of their Corns (*x*), for being allowed to Grind them at the *Miln* of the Proprietor of the *denominant Lands*.

Theſe Servitudes may ſubſiſt either Jointly or Severally, and may alſo be Eſtabliſhed without *Livery of Seiſin*, as being of themſelves only *incorporeal Rights*.

Urban Servitudes are 1. *Oneris ferendi*, whereby the lower Story muſt ſupport or bear the Weight of the higher. 2. *Tigni immittendi* whereby the Geſts of one Houſe muſt be let into, or fixed in the Walls of another. 3. *Stillicidii aut fluminis*, whereby one Houſe is liable to receive the Drops which fall from another, or the Heretor of the former is obliged to carry off ſuch Water by Sinks, Conduits, or the like: 4. *Altius non tollendi*, or a Reſtriction from building higher. And 5. *Non Officiendi luminibus*, or a Reſtriction upon the Proprietor of the Servient Tenement, hindering him from building higher, and alſo reſtraining him from doing any other Thing that might either darken the Windows, or impair the Lights of the *Dominant Tenement*.

What Perſonal Servitudes are, is already defined, and in Conformity to that Definition all Life-rent Rights fall under them.

A Life-rent Right is a Power of uſing and diſpoſing any Thing during Life, but ſo as the Subſtance thereof muſt be preſerved.

Theſe *Life-rents* are either conſtituted by *Law*, or by *Paction*.

The *Life-rents* by *Law* are the *Terce* and *Courteſy*, both which are already explained in the firſt Part of this Paper.

A Life-rent by Paction, is where the Right of Lands, or an Annuity, or Locality payable out of them, is either *given*, or *reſerved*, for Term of Life.

There is this Difference betwixt an *Annuity* and a *Locality*, that the former is ordinarily payable out of Lands, whoſe yearly Profits do far exceed the *Annuity*, and yet this *Annuity* affecteth the whole of theſe Lands, and is payable out of the firſt and readieſt of the whole Rents;

(*x*) Called *Miln Multures*.

ſo

ſo tho' one Part of the Lands ſhould fail, or be inſufficient, yet the reſt of the Lands would be burden'd with the Annuity; whereas a *Locality* is reſtricted to, or local'd upon particular Lands, whoſe annual Produce is conſtructed to be of equal Value with it; ſo that the Perſon to whom it is due, takes his Hazard of the Rents of that particular Parcel of Lands in Satisfaction of his Locality.

If a *Life-renter* ſurvive *Martinmaſs*, her Executors will have Right to the full Year's Rent, altho' the Conventional Term for the Payment of it were not until *Chriſtmaſs* or *Candlemaſs* thereafter; and if the Land was Laboured by the Life-rentrix, her Executors would have Right to the full Profits, whether ſhe died before or after *Martinmaſs*.

And here I diſmiſs all Servitudes, with theſe Reflections upon them, *viz.* 1. That no Man can have a Servitude upon what is his own; for the very Moment that the *Dominium* or *Property* of the Thing is acquired by him, the Servitude is *eo ipſo* extinguiſhed. And 2. If a Man have a Servitude upon what belongs to another, by acquiring the Servitude, he attains Right to every Thing that is neceſſary towards the Exerciſing and Explication of it; and thus if the Servitude were a *Via*, or the Privilege of having a *Road* thorough another Man's Ground, if that *Road* were broke down, or rendered impracticable, the *Haver* of the Servitude would alſo have the Liberty of laying down Stones, and Timber upon the adjacent Ground, *tho' not burdened with any Servitude*, in order to the amending or repairing of his *Road*: And again, if the *Servitude* were a Privilege of paſturing Cattle upon a Parcel of Lands belonging to *Titius*, tho' the *Paſture* were inviron'd with ſuch of *Titius*'s other Lands, as were no ways liable to any Servitude; yet the *Haver* of the Servitude would be allowed a *Loaning*, or *Road* even thorough thoſe Lands, in order to get at the *common Paſture*, and this doth proceed upon that remarkable Principle both in Law and Reaſon, that *Quando aliquid conceditur omnia conceſſa Videntur, ſine quibus Conceſſum explicari Nequit.*

Now, before returning to *Real Rights*, it is here obſervable, that the above-mentioned *Feus* with their *Caſualties*, Burdens, and whole Appurtenants, are tranſmiſſible either to *univerſal*, or yet to *ſingular Succeſſors.*

They paſs to univerſal Succeſſors by *Succeſſion* (*y*), after ſuch a Manner as ſhall be afterwards mentioned.

But they may be *burdened*, *affected*, or *tranſmitted in Favours of ſingular Succeſſors* (*z*) either *Voluntarly*, or by Diſpoſitions, Charters, Heretable Bonds, Wadſetts (*a*), Marriage Settlements, and Deeds of Entail (*b*), or *Neceſſarly* by Inhibitions, and Adjudications; all which real Rights, as well *Legal* as *Conventional* (*c*) (excepting Inhibitions alone) are, and muſt be compleated by Infeftment (*d*), or Seiſins taken upon them reſpectively, and theſe Seiſins muſt be regiſtred within ſixty Days of their Date, that ſo the Lieges may know of them, and be thereby effectually ſecured in their Purchaſes.

But tho' *Inhibitions* are not properly *Rights*, but rather a prohibitory Diligence proceeding upon, and affecting *Rights*, and ſo admit of no Seiſin; yet they with their *Executions* muſt be alſo regiſtred within forty Days after executing of them, or elſe they are void; and this proceeds upon the ſame Reaſon that has been immediately mentioned, namely, that *Purchaſers*, by inſpecting the Regiſters may be appriſed of them.

Now with Regard to Voluntary *Rights* (for Inhibitions and Adjudications, muſt be referred to the 3d and laſt Part of this Paper, where Actions and Judgments, and the neceſſary Execution thereupon fall to be treated of) it is here Noticeable, that tho' the *ſubject Matter* of the various real Rights above-mentioned be already explained, yet the true Nature of them cannot be thoroughly conceived, without mentioning a little of their Tenour.

And again, tho' the *Scottiſh Styles* and *Precedents* (*e*) of theſe *Real Rights* are ſeen to ingroſs whole Volumes, yet as a *Diſpoſition* is the *Sovereign Right*, I ſhall only ſet down a Brief of it, and thence raiſe the cleareſt Idea I can of the reſt, by pointing out their Singularities, and the Particulars wherein they may ſeem to differ from *Diſpoſitions*.

And therefore to proceed in my Summary Way, the Eſſential Points of a *Diſpoſition* are:

(*y*) Deſcent. (*z*) See p. (*a*) Mortgages. (*b*) Tailzies.
(*c*) See Diviſion of Rights, p. 47, 48. (*d*) Infeoffment. (*e*) Styles, or Style-Books.

1. *The Title or Deſignation of the Heretable Proprietor (or Diſponer) and his Receipt of a ſpecial Sum, as the full adequate and agreed Price of the Lands (to be) diſponed, holding him well Content therewith, and renouncing all Objections proponable in the Contrair.* 2. *Diſpoſitive Clauſe, diſponing the Lands,* &c. *with all Title, Intereſt and Property thereof in Favours of the Diſponee, and any particular Series of his Heirs.* 3. *Obligement to Infeft in the Ward-Lands by Reſignation, and in the other Lands by double Infeftment, and manner of Holdings* a Me (*f*) *or* de Me (*g*), *the Infeftment* a Me *to be either by Confirmation or Reſignation.* 4. *Procuratory of Reſignation for reſigning the Lands diſponed in the Hands of the Superior in Favours, and for New Infeftment to the Diſponee, and thereupon Acts, Inſtruments and Documents to raiſe,* &c. 5. *To Warrand the Lands from all Mortgages or Grounds of Eviction, and that Intimation be made to the Diſponer to Defend againſt any imminent Eviction.* 6. *Exception from the Warrandice, and that the Exception ſhall infer no Homologation of the Right excepted.* 7. *Aſſignation to all Charters, Diſpoſitions, Rights of Teinds, Writes and Evidents diſpenſing with the Generality,* &c. 8. *Aſſignation to the Mails and Duties and Teinds.* 9. *Abſolute Warrandice as to the Writes, ſimple Warrandice or Warrandice from Fact and Deed as to the Teinds and Duties, but Prejudice to uſe the Grantors own Right to the Teinds.* 10. *Obligement to free from all* Debita Fundi, *or other Burdens preceding the Term of the Sale, the Diſponee relieving the Diſponer thereof for the future.* 11. *Diſpoſition to the Seat, Desk and Loft in the Church, and to the Ground whereupon the ſame is built.* 12. *Delivery of the Writes* (*h*) *conform to an Inventory mutually ſubſcribed.* 13. *A Clauſe conſenting to the Regiſtration of the Deed.* 14. *Precept of Seiſin, being a Command from the Diſponer to the Baillie (whoſe Name is left Blank) to give Seiſin of the Lands, and others Diſponed, by Tradition of Earth and Stone, or other proper Symbols thereof to the Diſponee, or to his certain Attorney, and this Precept ſhould be excentrick of Ward-Lands.* 15. *The Clauſe of Subſcription expreſſing the Date, Place and Witneſſes Names and Deſignations.*

As theſe are the requiſite and ordinary Clauſes of a Diſpoſition, ſo all of them may, from their Tenor, be eaſily underſtood, excepting

(*f*) Of the Diſponer's Superior. (*g*) Of the Diſponer and his Heirs. (*h*) The Rights or Progreſs to the Lands.

the 3d, 6th, 10th and 14th Clauſes: And therefore the Reader may peruſe theſe Clauſes with the following reſpective Remarks upon them.

And 1. As to the 3d Clauſe, *Ward-Lands* muſt paſs by Reſignation, or be reſigned in the Superior's Hands, that he may give, or renew the Infeftment in Favours of the Diſponee, becauſe (as has been already obſerved) theſe Lands ought not to be ſold without the Superior's Conſent.

2. When the Superior accepts of the Reſignation, and grants a Charter in Conſequence of it, this is called a *Charter of Reſignation*; but when he Confirms the Right formerly granted, it is only a *Charter of Confirmation, & nihil Novi Juris tribuit.*

2. The Meaning of the 6th Clauſe is, that poſſibly the Diſponer may have conveyed with the Lands Tacks, Leaſes, or ſome ſuch Rights, which (had he kept the Lands) he deſigned to have quarrelled; but then as ſuch Rights muſt ſtand good until they be legally reſcinded, upon that Account, the Diſponer reſolving to run no Hazard of any Law-Suit, excepts them from his Warrandice; but at the ſame Time impowers the Diſponee to Quarrel them as the Diſponer might have done; and leſt the Exception from the Warrandice ſhould infer any *Homologation* of the diſputable Rights excepted, the Deſign of the Clauſe is to prevent that Inconvenience.

3. For underſtanding the 10th, as well as the 5th Clauſes, it is fit to know that *Warrandice* is either *Real* or *Perſonal.*

Real Warrandice is where one Parcel of Lands is mortgaged for the Security of another; but in *Perſonal Warrandice* the Grantor, and his Heirs are only liable.

And again, this *Perſonal Warrandice* is either *Simple*, *Abſolute*, or Warrandice from *Fact and Deed.*

In *Simple Warrandice* the Grantor Warrants only againſt his own ſubſequent Deeds.

In *Abſolute Warrandice* he Warrants at all Hands, and againſt all Mortal.

And *Warrandice from Fact and Deed* imports only, that the Grantor has not done, and that he ſhall not do any Fact or Deed to the Prejudice

dice of the Rights warranted: And Warrandice is never incurred until the Lands, or Things warranted are legally evicted.

4. With reſpect to the 14th Clauſe it has been already hinted, that Diſpoſitions are compleated by Seiſins that follow upon them; now, either the *Procuratory*, or *Precept* may be the Warrant of ſuch Seiſins.

And the Seiſin itſelf is nothing elſe but an Inſtrument (of a ſettled Style) ſubſcribed by a Notary and four Witneſſes, ſetting forth that upon ſuch a Day at a certain particular Hour, the Diſponee was ſeized and inveſted in the *Feu* in Virtue of his Diſpoſition, by getting Earth and Stone for the Lands, *a handful of Corn or Graſs for the Teinds*, and the like proper *Symbols* for the other Things *diſponed* (*i*), delivered by the *Diſponer* or his *Baillie* to the *Diſponee*, or to his certain *Attorney* for that Effect.

Tho' the Diſponee may be thus Infeft upon the *Precept* of his Diſpoſition, yet the Caſualties of Superiority would fall by the Death of the Diſponer, or of him who ſtood laſt inveſted by the Superior; for which Reaſon, and becauſe a Seiſin upon the Precept is only reckoned a *Baſe Right*, and an Infeftment, *a me & de Superiore meo*, being a more Noble Tenure than an Infeftment *de me & Succeſſoribus Meis*, it is therefore expedient for the Diſponee to procure a Charter from the mediate, direct, or ſupream Superior of the Lands, and thereupon to obtain himſelf Infeft in Virtue of the Precept of Seiſin in it contained.

This *Charter* is nothing elſe but a Diſpoſition of the *Feu* by the Superior to the Vaſſal; it is true it is in *Latin*, and upon Parchment, which Diſpoſitions are not, and Diſpoſitions have *Procuratories* of *Reſignation*, *which all Charters* want; for after the Feudal Law, (which as it gave Riſe *to*, ſo it ſtill continues to regulate all *real Rights*) (*l*) had taken Root in the Country; and that in Virtue thereof, King *Malcome the* 3d (Sirnamed *Canmore*) conceiving himſelf to be King and Lord of the whole Lands, as well as of the whole Inhabitants, did, about the beginning of his Reign, (which begun *Anno Chriſti* 1057.) diſtribute the whole Lands of *Scotland* amongſt his Subjects as his own *Liege-*

(*i*) As Net for Fiſhing, &c.

(*l*) A real Right what? See p. 48.

Men (*m*). It is very probable that ſuch original Diſtributions were made by *Charters*, and not by *Diſpoſitions*, becauſe *Procuratories of Reſignation* contained in Diſpoſitions do always ſuppoſe, that the Diſponer has an immediate Superior, whereas, if *Malcom* had any Superior, then that Superior, and not he (*n*), was to be accounted King; but the *Scots* Kings were ſubject to no Humane Superiors, and thence it proceeds to this Day, when the King denud's of Lands, that muſt be done by *Charter*, and not by *Diſpoſitions* or *Procuratories* of *Reſignation*.

Heretable Bonds are a ſort of redeemable Diſpoſitions, with this *Peculiarity*, that they contain a Perſonal Obligement for Re-payment of the Money for which they were granted; and this Obligement is conceived in Terms of the Perſonal Bond above deduced (*o*).

Wadſetts (*p*) are either *proper* or *improper*; and the Difference lies in this, That in the former the Wadſetter (*q*) takes his Hazard of the Rents of the Lands in Satisfaction of his Annual Rents, and pays himſelf the Ceſs (*r*), and all other publick Burdens; but in the latter, the *Reverſer*, or Grantor of the Wadſett pays the publick Burdens; and if the Lands were deficient, he would be alſo obliged to make up the Wadſetter's Annual Rents.

A *Wadſett* is in *Latin* called *Hypotheca*, and is nothing elſe but a redeemable Diſpoſition, whereby Lands or Houſes are impignorated, or pledged upon certain Conditions, and for Security of any particular Sum of Money.

Contracts of Marriage and Aſſignations.

BEFORE any Mention of *Contracts* of *Marriage*, or Marriage *Settlements*, it is fit to know, that as *Feus* and *Real Rights* are conveyed by *Diſpoſitions*; ſo *Moveables* (*ſ*), and all *Perſonal Rights* are tranſmitted by Aſſignations.

And theſe Aſſignations do firſt contain a Narrative (*t*) of the Right to be aſſigned (*u*), and then the Perſon to whom the Aſſignation is

(*m*) *Tanquam ligati*, as being bound in Fealty to him their Lord and King. (*n*) *Malcome*. (*o*) Page 63. (*p*) Mortgages. (*q*) Mortgagee. (*r*) Supply or Land-Tax. (*ſ*) So called, becauſe they may be moved from one Place to another. (*t*) Recital. (*u*) Conveyed.

granted, is nominated and conſtituted the Cedents (*x*), Ceſſioner, and Aſſigney (*y*) in and to the Right and Thing to be aſſigned.

But ſince *Moveables* as well as Lands, are often tranſmitted by *Marriage Settlements*, it is thence Conſequential that *ſuch Contracts* do participate of the Nature of both *Aſſignations* and *Diſpoſitions*: And yet there is this Noticeable Diſtinction betwixt them, that Contracts of Wadſett, Marriage Settlements, and all other Mutual Contracts, ought to be expreſſed in the third Perſon, whereas Depoſitions and Aſſignations are only expreſſed in the firſt.

Tailzies, or Tails.

Tailzies, or the *Talliata Succeſſio*, is neither mentioned in the *Civil*, *Feudal*, nor *Divine Law*; but it is reported, that either the *Engliſh* derived them from the *Normans*, or elſe invented and gave Sanction to them, by an Act of Parliament of their own, made at *Weſtminſter* in the Reign of the *Firſt Edward*, after the Conqueſt, about the Year 1280. And tho' afterwards they were introduced from *England* to *Scotland*, yet before that Time, there is not the leaſt Veſtige of them to be found in either of the two Kingdoms.

It is alſo a Doubt, but of no great Import, whether the Words *Tail*, or *Tailzie*, are derived from the *French* Words *Taille*, i. e. *Sectura*, and *Tailer*, i. e. *Scindere*, becauſe the legal Succeſſion is cut off by *Tails* or *Tailzies*, or whether they had their Names from the *Latin* Word *Talis* i. e. *ſuch*; becauſe talzied Lands fall not to lineal or lawful Heirs, but are limited to *ſuch only* as are in the Entail.

Either of the Derivations doth well enough Quadrate with the Nature of the Thing, and the Definition of a Tailzie, which (as the Word implies) *Is an Amputation of the lineal or legal Succeſſion, and a Limitation or reſtrictive Conveyance of the Feu in Favours of a more delectable Series of Heirs.*

Theſe *Tailzies* are naturally prejudicial to Commerce, and Repugnant to the Nature of *Dominium* or Property; for a Man cannot call that his own, which he is neither allowed to Sell, nor yet to Uſe and Diſpoſe of at his Pleaſure, and that is the Caſe of ſuch Eſtates as are ſtrictly Talzied.

(*x*) Grantor of the Aſſignment. (*y*) Aſſignee.

And

And if a Man were condemned to the *Gallies*, piratically ſeized by the *Algerines*, or captivated in any foreign Country, were it not unreaſonable that he ſhould be hindred to redeem his Life and Liberty, by the Sale of his Eſtate, and why ſhould he be allowed to ſtarve Abroad, whilſt he had an opulent Fortune at Home.

Beſides, *Heirs of Entail* perceiving that their Parents cannot exheridate, or diſinherit them; and that their Eſtates ſtand ſecure, as not being affectable by Creditors, are therefore apt to let fly at all manner of Senſuality, Vice and Pleaſure; and by Conſequence do not only prove Enemies to Induſtry, and uſeleſs Members to the Common-Wealth, but are alſo apt to forget their Obedience to Parents, and too prone to throw off that filial Dependance which is founded on Juſtice as well as upon publick Utility.

Altho' upon theſe and the like Grounds *Talzies* are none of the moſt favourable *Rights*; yet they ſeem to have been originally contrived for the Preſervation of conſiderable Families, and they are allow'd of for that *End*, and upon *this Principle*, viz.

That as every Man may diſpoſe of his Property at his own Pleaſure, ſo nothing hinders him to exheredate his Heirs, or to give them his Eſtate ſub modo, *and under ſuch Limitations, Reſtrictions and Conditions, as he ſhall think Convenient:* Providing that all this be done, after ſuch habile manner as the Law directs.

Such Tailzies are expede in *Scotland* by *Procuratories of Reſignation*, differing only *from ordinary Diſpoſitions* as to the *Deſtination*, *Nomination* or *Subſtitution* of Heirs; and in this, that Tailzies are ordinarily ſtuffed with many *irritant and reſolutive Clauſes*, which are not commonly uſed in ordinary Diſpoſitions.

An *Irritant Clauſe* is that which makes ſome Penalty to be incurred, and the Obligation to be void for the future; but a *Reſolutive Clauſe* is that upon which (for not Performance of ſomething) the Deed, Contract, or Obligation is declared to have been Void and Null from the beginning.

Theſe Tailzies are not effectual unleſs they be regiſtred in a particular Regiſter appointed for that Purpoſe, that ſo neither Creditors nor Purchaſers may be enſnared by them.

But

But ſuch Entails were found ſo inſufferably Inconvenient in *England*, that *Fines* (*z*) and *Recoveries* (*a*) were there invented for defeating or evacuating of them.

A *Fine* (*b*) is by the Civilians called *Tranſactio Judicialis de re immobili*; and the *Engliſh* Lawyers (*c*) define it to be, *an Inſtrument of Record of a final and judicial Agreement, betwixt Parties in Suit concerning Lands or Hereditaments*; *and* Glanvile *Terms it, amicabilis Compoſitio & finalis Concordia, ex Conſenſu & licentia Domini regis, vel ejus Juſticiariorum.*

A *Common Recovery* (called in the Civil Law *Recuperatio*) is in *England* a Sort of Conveyance and Aſſurance of Lands; and *Wood* deſcribes it to be, *a feigned Suit and Judgment upon a real Action brought by one againſt another, that is ſeized of the Freehold, to deſtroy Eſtates in Tail, Remainders and Reverſions, and to bar the former Owners thereof.*

Having before ſhewed that *Tails*, or *Tailzies* were originally introduced from *England* into *Scotland*, and having alſo hinted *how*, and *why*, the *Engliſh* have thought fit, to deviſe Remedies againſt the dangerous Effects and Inconveniencies of rigorous and ſtrict Tailzies, and alſo opened a little of the Nature of thoſe Remedies; the Reader needs therefore be at no great Loſs in reſolving whether the Suggeſtions here made concerning the *Talliata Succeſſio*, when joined to the Practice of the *Engliſh* Nation in that Particular, may not be ſufficient Reaſons for introducing into *Scotland* the like Remedies concerning Tailzies, which (as I have already ſhewn) do take Place in *England*, from whence the *Scottiſh* Tailzies were originally derived.

If the Proprietor don't ſettle nor diſpoſe of his Lands and Goods, either by Tailzie, Diſpoſition, Aſſignation or ſome other Deed, at leaſt ſixty Days before his Death, then both his *Heritage*, and all his *Moveables*, excepting only the *Dead's Part* (*d*), (upon which he may Teſtate at any Time) will fall to his neareſt Heirs, in ſuch Order of *Succeſſion* as the Law of *Scotland* doth direct.

(*z*) From *Finis*. (*a*) *Recuperationes*. (*b*) From *Finis*. (*c*) See *Wood*'s Inſtitute Fo. 239. (*d*) The whole Moveables where there is neither Wife nor Children; the Half where there is but the one or the other, and only a Third of them, if he hath both Wife and Children.

SUCCESSION.

Succeſſion is a very important Title in Law, becauſe all Rights and Eſtates paſs by it, at leaſt once every *Century*, and very frequently much oftner.

However, there is no Place for Succeſſion, unleſs a Man die Inteſtate; but then if he do not at all Diſpoſe of his Property and Goods, or yet if he fails to do it after ſuch Manner as the Law directs, in either Caſe he is conſtructed to have died Inteſtate, and then there is Place for the *Legal Succeſſion* (*e*).

This *Legal Succeſſion* ſeems to divide itſelf into two ſeparate Streams; the one runs *in Stirpes*, and the other *in Capita*: And again, theſe *Streams* are diverted into two different *Channels*; in the one is tranſmitted all manner of *Heritage*, and in the other all *Moveables* are naturally *conveyed*.

The *Succeſſio in Stirpes* is where the *Race* or *Degree of Blood* is mainly conſidered, and not the Number of Perſons ſucceeding; as for Inſtance, if there were only one Son, and three Grand-Children by another Son, the Grand-Father's Means would, by the Civil Law, only admit of two Diviſions; the one to the Son, and the other to the three Grand-Children, they only ſucceeding in Right of the other Son.

But the *Succeſſio in Capita* is where there are as many Diviſions as there are Perſons ſucceeding; and thus in *Scotland*, the free Moveables are divided equally amongſt ſuch Children as are not, *foris familiat*, or gone out of the Family.

But for framing a true Idea of this important *Title*, upon which all manner of Right doth in ſome Meaſure depend, it is Neceſſary to trace the Matter of Succeſſion a little further back than either the *Scotch*, or *Roman* Laws.

For no doubt, the Right of Succeſſion proceeds from a higher *Fountain*, and is founded upon the *Law of Nature*, and we find expreſs *Regulations* concerning it in the *Law of Moſes*; and both theſe were certainly antecedent to the Civil, as well as the *Scotch* Laws.

(*e*) Deſcent.

That Succeſſion according to *Proximity of Blood*, doth flow from the Law of Nature is unqueſtionable, becauſe upon the Death of a Perſon, every Man is ſatisfied from the Principles of his own Heart (without farther Ratiocination) that the next in Blood ought to ſucceed to him.

And thus by the ſimple Force of theſe Natural Principles, even the Unreaſonable and *Savage Husband-Men* were enabled to diſtinguiſh the *Rightful Succeſſor*; for they are brought in ſaying, *This is the Heir, let us kill him, and ſeize upon his Inheritance* (*f*).

Nay, ſo ſtrong is the Right of Succeſſion founded upon the Law of Nature, that a Man may be ſerved Heir to his Great Grand-Father, or even to any of his Anceſtors after many Ages; for the Right of Blood can never be extinguiſhed, *Nam Jura Sanguinis Nullo Jure Civili adimi poſſunt.*

And this is ſo true, that tho' a Remoter Kinſman ſhould Poſſeſs for 100 Years, yet ſo long as the next by Blood exiſted, he could by no length of Time preſcribe a juſt Title; for Lawyers ſay, that no Man can preſcribe a Right againſt the *Law of Nature.*

By this *Law of Nature* there is no Diſcrimination betwixt *Sons* and *Daughters*; but all thoſe of the ſame Degree *being of the full Blood*, are intitled to ſucceed equally; and thus St. *Paul* doth argue from the Law of Nature, when he ſays, *If Children then Heirs* (*g*): For this could be no Conſequence from the Judicial Law, becauſe there the Sons did not ſucceed equally, for the firſt Born had a Right to a *double Portion*, as ſhall be immediately ſhewn.

And again, in the *Civil Law* (which is the beſt Picture extant of the *Law of Nature*) it is ſaid, that the placing of any Difference betwixt the *Male* and *Female Line* as to ordinary Succeſſions, is an *Arreignmnt* of the very *Law of Nature*, as if Nature herſelf had blundered, and as it were miſtaken her Courſe, in the Production of *Females*; whereas nothing can be more contrary to Nature, than that *Males alone* ſhould be the ſole Production of it, nor nothing more repugnant to Reaſon, than the Excluſion of Females from Succeſſion, ſince the humane Race can't be propagated without them.

(*f*) Matthew. (*g*) Romans viii.

And upon this Ground it is indefinitely ſaid, That *Ratio Naturalis quaſi lex quædam tacita liberis Parentum hæreditatem adjecerit, veluti ad debitam Succeſſionem eos vocando* ; here it is plain, that there is no Diſtinction made betwixt *Male* and *Female*, and that all the Children of the ſame Degree ſucceeded equally, and *in Capita*.

But this ſeems only to regard Matters of *Property*, for with reſpect to *Government*, *Titles of Honour*, and *Rights indiviſible*, there ſeems to have been a *Preference* annexed to *Seniority*, even in the very *Law of Nature*, which certainly preceded all other Laws.

And thus God having at firſt created only one Man, his Children were certainly ſubject to him, as all Children yet are to their Parents ; *and his Right to govern his own Deſcendents, and their Obedience to his Paternal Power*, were both equally well founded upon the *Laws of Nature* ; for there were at that Time no other Laws in *Being*.

And *Natural Inſtinct* ſuggeſts that the eldeſt Son, or next by Blood, could only ſucceed to him in this *Paternal Power* over the Deſcendents, becauſe as the younger or youngeſt may be naturally ſuppoſed to have been too young, and Conſequently unfit for Governing ; ſo if it be ſuppoſed that the *Paternal Power (which in its own Nature is indiviſible)* had been to devolve upon the *wiſeſt* or *ſtrongeſt* of them, this muſt have occaſion'd great Uncertainties, many *Rivals*, and ſome *Interregnums* ; whereas the very *Light of Nature* could ſhew that it muſt be certain *who was the eldeſt*, and that the Preferring him to the *Paternal Power* would prevent Rivals, preclude all Debate, and remove all Diſſention ; and Conſequently this Right of *Paternal Power*, and the ſtating of it in the eldeſt Son of the eldeſt Family, may be fitly traced from the firſt and pureſt Principles of the very Laws of Nature.

And this *Right of Preference in Seniors* with reſpect to Government, and according to the Law of Nature, is further cleared up by that Expreſſion of our Saviour (*b*), *But he that is greateſt among you, let him be as the younger* ; for there being a Strife among the Apoſtles, which of them ſhould be accounted greateſt, and our *Saviour* having related how the Kings of the *Gentiles* exerciſed Lordſhip over them, he then Inculcates that his *Apoſtles ſhould not be ſo, but that the greateſt among them ſhould be*

(*b*) Luke xxii.

as

as the youngeſt (*i*); which as it clearly ſhews, that the youngeſt were not intitled to exerciſe *Authority* or *Lordſhip*, ſo it likewiſe implies, that the Kings of the *Gentiles* were allowed the Exerciſe of it, as being the *eldeſt*; and at that Time the *Gentiles* were only acted by the Laws of Nature, they not being then enlightened with the *Jewiſh Law*; for as to that Law it is elſewhere in Scripture ſtated by way of Queſtion, *What Nation is ſo great that hath Statutes, and Judgments ſo Righteous, as all theſe Laws which I have laid before you?* Now there could be no Queſtion in this Caſe, if the *Gentiles* had been favoured with the very ſame Laws; and if they were not, then it is plain, that they had only the Laws of Nature for their Guide and *Directory*, and conſequently their preferring the eldeſt (and not the youngeſt) to *Dominium*, *Lordſhip*, *Juriſdiction*, or *Authority*, was clearly a Deduction from the *Laws of Nature*.

The *Right of Seniority, or Primogeniture, was not diminiſhed by the Law of* Moſes; but was rather carried a little higher than what it had been in the *Law of Nature*.

For by the Moſaick Law, the *Firſt-Born* was ſanctified unto the Lord, and *Abraham*, in Virtue of his *Paternal Power*, ſeems to have acted as King over his own Sons and Servants; for he leads them out to Battle againſt *Tidall* (*k*) King of Nations, and ſundry other Kings, overthrows them at *Dan*, returns in Triumph, and in a Word, acted as abſolutely as King, as any Sovereign Monarch can yet do over his own Subjects.

And for the better Support of the Tribe or Family, *Abraham* by his laſt Will, left all that he had to his Son *Iſaac* (*l*), and to the Sons of the Concubines he only gave Gifts, and ſent them into the Eaſt Country.

But tho' this merely proceeded upon the expreſs Will of the *Patriarch*, yet by the Common Law of the *Jews*, the *Firſt-Born* (as being the Beginning of his Father's Strength) was unqueſtionably intitled to a *Double Portion* of all that the Father had; and this was called the *Right of the Firſt-Born*.

(*i*) *i. e.* Not accounting themſelves Great by the Exerciſe of *Dominium* and Authority. See Matthew xx. xxv. (*k*) Geneſis xiv. (*l*) Geneſis ii. v.

Excepting

Excepting this Preference as to the Double Portion, Sons being of the ſame Degree, ſucceeded all Equally, and the ordinary Courſe of Succeſſion, ſettled by the *Law of Moſes was, that failing a Son or Sons, the Inheritance paſſed unto Daughters* (*m*) ; *failing Daughters, to Brothers ; failing theſe to the Father's Brethren ; and if the Father had no Brethren ; in that Caſe the Inheritance paſſed to the next Kinſman of the Family.*

In this Order of Succeſſion there ſeems to be three Things very remarkable, whereof the firſt is, that in it there is no Mention of the *Succeſſion of Parents* ; nay, the Uncle, or Father's Brother *(and not the Father)* comes in after Daughters ; but this only ſeems to proceed upon Suppoſition, that Parents or Fathers, were in the ordinary Courſe of Nature ſurvived by their own Children, and conſequently needed not be mentioned in the Order of Succeſſion ; for I find that *Cicero* makes the Proviſion or Suſtentation of Parents a *Natural Remuneratory Obligation* upon their Children ; and that they did ſucceed by the *Roman* Law, ſhall be afterwards ſhewn : However, the Law of *England* imitating the *Moſaick* Law, actually prefers the Father's Brother, to the Father himſelf, as ſhall be afterwards explained.

The next Thing remarkable is, that the Female Line was by no Means precluded from the Succeſſion ; on the contrary, the Daughters of *Zelophehad* (*n*) having ſtrongly ſet forth their Claim to the Prieſts, the Princes, and to the whole Congregation of the *Iſraelites*, elegantly ſhewing that their Father *had by no Means forfeited his Right, ſeeing that he had been no Ways concerned in the Rebellion of Korah* ; and *Moſes* having laid their Caſe before the Lord, *it was ordained that the Inheritance of their Father ſhould paſs unto them* ; and ſo (without any Double Portion) they ſucceeded equally according to the Law of Nature.

The 3d Thing remarkable is, that to the *Privileges of Promogeniture* authorized by the Law of Nature, that of the *Double Portion* was ſuperadded by the *Law of Moſes* ; and the Preference of Sons to Daughters not being introduced by the Law of Nature, was plainly a Divine Diſpenſation with the Effect of *Natural Equity* ; for by it *Male* and *Female* of the ſame Degree and Proximity of Blood are intitled to ſucceed equally.

(*m*) One or more. (*n*) Numb. xxvii.

And

And here; tho' *Almighty God* did, for Preſervation of the Tribes, and the Expedience of his Choſen People the Children of *Iſrael*, think fit to diſpenſe with the *Laws of Nature*, and alſo in ſundry other *Inſtances* authorized the Alteration of the *Natural Courſe of Succeſſion*, as in the Caſes of *Jacob* and *Solomon*, who ſucceeded contrary to the ordinary Courſe of Succeſſion, and in Oppoſition to all the Privileges of Birth-Right and Poſſeſſion; yet ſince theſe Things were authorized by the expreſs Command of God, the needing of a Command, and the expreſſing of it, ſufficiently ſhews that they are no more to be drawn into Example, than the clandeſtine Abſtraction of the *Egyptian Jewels*, which could only been warranted by the like *expreſs Command.*

And tho' theſe Inſtances may ſeem inconſiſtent with Juſtice, and repugnant to that *firſt Principle* that is imprinted upon, or ſtated in the Soul of Man, and is commonly termed the *Law of Nature*; yet it will not thence follow, that Men may, in other Caſes, traverſe the Laws of Nature at their Pleaſure, nor yet that the Divine Juſtice is in the leaſt impeached by the *Almighty*'s diſpenſing with them in the Caſes above-mentioned.

Becauſe, as the *Law of Nature* was at firſt imprinted by the Finger of God upon the Soul of Man, to be the Standard and Primary Rule of his future Life and Converſation; ſo it is rational to conclude (with reſpect to Man) that the very receding from that *Divine Rule*, muſt be in ſome Meaſure Criminal upon his Part, and the Generality of Criminaliſts are agreed, that *Violations* of the Laws of Nature, do ordinarily Conſtitute the greateſt Crimes that Humane Nature is capable of.

And yet, with reſpect to *God*, as any earthly King having imprinted his Image upon a Piece of Wax, might lawfully deface or change the Impreſſion at his Pleaſure, (altho' thoſe Subjects who broke down, or defaced the Statues and Images of the *Roman* Emperors were condemned as guilty of Treaſon) ſo nothing doth hinder the *Author* of the *Law of Nature* (which of itſelf is nothing but a Divine *Impreſſa* upon the Soul) either to deface, diſpenſe with, or yet to alter or divert the Courſe of it, according to his own Will; for the true Phyloſophy of that Matter doth lie in this;

That

That all *Sin* and *Injuſtice* is a *ſwerving from the Rule*, and the Law of Nature, being an *immutable Rule for Mankind*, the receding from it muſt therefore be Unjuſt, or a Sin upon his Part.

But the *omnipotent God*, being to himſelf the eternal and only *Rule*, it is impoſſible he can ſwerve from the *Rule*, becauſe he cannot recede from himſelf, and therefore he can never Sin, becauſe it is impoſſible that he can ſwerve from the Rule.

And again, this Point may be eaſily underſtood by conſidering that what is done by an *expreſs Command* (*o*), is certainly done by the Will of God; and what is done by his Will, can be no Offence againſt his Commands; and what is no Offence againſt his Commands can be no Sin, and therefore what is done by his Will can be no Sin.

For what is done according to the Will of a *Prince*, doth neither Counteract his Will, nor Contemn his Authority, and ſo is neither a ſwerving from the Rule, nor yet any Impeachment of his Commands.

What Dependance the *Right of Succeſſion* has upon the *Law of Nations*, is not ſo Perſpicuous from the ordinary Courſe of Succeſſion, followed by private Families, as by making a Survey of the gradual Order of Succeſſion almoſt Uniformly obſerved in all Hereditary Monarchies: For as *Bodinus* ſays, *Ordo non tantum Naturæ, & divinæ, ſed etiam omnium ubiq; Gentium hoc poſtulat.*

And upon this Ground *Charles* the Vth of *France* was plainly told, that the *Salique Law of Succeſſion* (*p*) could not be broke, notwithſtanding his utmoſt Endeavours to the contrary.

And tho' *Amurat* the *Grand Seignior* thought fit to paſs by *Ibrahim* his *Brother*, and to leave the *Turkiſh* Empire to *Han* the *Tartarian*, yet the Officers of that State, unanimouſly diſregarded the *Grand Seignior*'s Will, and reſtored *Ibrahim* (tho' a ſilly Fool) as being the true Heir to the *Turkiſh* Empire.

But as this Paper only regardeth Matters of private Right, I ſhall therefore forbear any further Scrutiny into the Law of Nations touching the Right of Succeſſion; and inſtead thereof, ſhall only endeavour to explain how the *Roman* Law proceeded in that Particular; and for that Purpoſe it is fit to know,

(*o*) *Viz.* Of God. (*p*) The proper or peculiar Law of the Eaſtern *Franks*, called *Sallii*, from the River *Sala*, *Lex Salica*, ſome make it a Corruption of *Lex Gallica*, others derive it from *Sialiqua*.

That the Laws of the twelve Tables are reckoned the moſt ancient Statutes of *Rome*; and the Order of Succeſſion in them was, that after Sons, the neareſt Agnate (*q*) ſucceeded, and all Cognates (*r*) were excluded; but the Pretorian Law altered this, and by it Cognates were reſtored to the Suceſſion; for *Prætor Naturalem æquitatem Secutus, iis etiam bonorum Poſſeſſionem, contra 12 Tabularum leges, & contra Jus civile, permittit: Et Poſtea Juſtinianus, ſecutus æquitatem edicti, Succeſſionem admiſit in legitimis hæreditatibus. Digeſt:*

There were five moſt remarkable Branches of Succeſſion in the Civil Law, namely, that of *Deſcendants*, *Aſcendants*, *Collaterals*, *Naturals*, and the reciprocal Succeſſion *of Husband and Wife.*

Among theſe Orders of Succeſſion, the firſt Degree was Children, whether Male or Female, or *Deſcendants in linea recta*; *failling Deſcendants*, then *Parents* or *Aſcendants* in the direct Line without Diſcrimination of either Sex, were allowed to ſucceed in the ſecond Place; for *Turbato Mortalitatis ordine Pietas & Miſeratio Parentes ad liberorum Succeſſionem admiſit.* The third Degree was compoſed of Brothers and Siſters or other Collaterals: And in this Order the Grand-Sons of one Brother, were allowed to ſucceed with the reſt of their Grand-Father's Brethren (*ſ*). But then they only ſucceeded *in Stirpes*, but not *in Capita*, for they could claim no further Right or Intereſt in the Succeſſion than their Grand-Father had; and tho' it may be true, that Natural Children, *non legitimati*, did not properly ſucceed by the *Roman* Law; yet it's there ſaid, that *ab inteſtato, ultra alimenta, a lege iis eſt attributus ſextans bonorum una cum matre dividendus.* And by reaſon of the cloſe Union that is betwixt Husband and Wife, (failing Agnates and Cognates) they reciprocally ſucceeded to one another.

But all this Order of Succeſſion was regulated by one Sovereign Rule, *That every Man might teſtate upon his own as he pleaſed, Uti quiſq; legaſſet de ſua re ita Jus eſto*; and diſallowing this Principle, it will be hard to account why moſt, if not all the Countries of *Europe*, have ſo much

(*q*) Agnates were thoſe deſcended of the Male Line, *Qui per virilis ſexus Cognationem deſcendunt.* (*r*) Cognates were thoſe deſcended of the Female Line, *aut qui per Fœminas Conjuncti erant.* So that even a Siſter might be an Agnate, tho' her Deſcendants muſt been Cognates. (*ſ*) Fraternity.

receded from the natural Order and Courſe of Succeſſion; or why they ſhould differ ſo much from one another in that Particular.

SUCCESSION by the Feudal Law.

AS the 2d Part of this Paper relateth chiefly to *Feus*, it were improper in Silence to paſs over the *Feudal Succeſſion*, becauſe the Courſe of Succeſſion obſerved in *Scotland*, may be in ſome meaſure illuſtrated by it: For tho' the Order of Succeſſion preſcribed by the *Feudal* Law, be not preciſely followed in *Scotland*, nor in any other Country; yet moſt Nations in *Europe* have ſooner or later, been in ſome Meaſure regulated by it.

And becauſe there is ſo much Coincidence betwixt the Feudal and *Scottiſh* Order of Succeſſion, when the latter ſhall be explained, an Idea of both may be conceived, by explicating in this Place the moſt material Variations betwixt the two.

And by the Feudal Law, to begin with Deſcendants *in linea recta*, the Sons ſucceeded all equally, and Daughters were abſolutely excluded from the *Feu*; but yet in the Feudal Law it ſelf, there were Exceptions in both Caſes.

For with Reſpect to the former, Sons of a 2d Marriage had no Share in the Succeſſion with the Sons of the firſt; for when the Feudal Succeſſion begun to take Place, ſecond Marriages were ſo very unfavourable, that they were hardly rekoned lawful, and therefore Children of a ſecond Marriage were called *ad Morganaticam Nati*, becauſe they got nothing of their Father's *Feu*, excepting a *Morganaticam* (*t*), or ſuch a Proviſion as was ſtipulated in their Favour by the Marriage Settlement.

The Feudal Dignities were alſo excepted, and in theſe there was no Succeſſion by the Feudal Law, for none of the Sons were born Dukes, Marquiſſes or Earls, becauſe they attained not any Feudal Dignity, until a new Inveſtiture was firſt obtained.

(*t*) It alſo ſignifies a *Morning Gift*, after the Celebration of Matrimony.

FH
MVSEVM
BRITANNICVM

The

The Female Line was cut off from Succeſſion by the Feudal Law; becauſe they did not bear Arms, and were reckoned unfit for military Service: And ſome add, that they were precluded becauſe they could not aſſiſt in Council, as being unable to conceal the Secrets of their Superiors.

But there were likewiſe many Exceptions from this Rule; for Women did often ſucceed by the Tenour of the Inveſtiture, tho' not by the Nature of the *Feu.* 2. They ſucceeded in *Feuda fœminea*, or where *Feus* came, and were devolved upon an Heir by the Mother. 3. Nay in ſome Caſes they were preferred to Males; for a *Grand-Daughter* by a Son, was preferable to a Grand-Son by a Daughter, becauſe the former repreſented her Father, whereas the latter did only repreſent his Mother.

Another Singularity in the Feudal Succeſſion with Reſpect to Deſcendants, was that Grand-Children, Great-Grand-Children, and Great-Great-Grand-Children ſucceeded all equally, but *in Stirpes, ſed non in Capita.*

All Aſcendents were precluded from Succeſſion by the Feudal Law, for tho' Children ſucceeded to Parents; yet Parents were not allowed the Privilege of ſucceeding to their own Children; and perhaps the Reaſon was much the ſame with what has been already aſſigned for the Omiſſion of Parents out of the *Jewiſh Succeſſion*: Yet the more proper Feudal Reaſon ſeems to be, that in *Feus*, the original *Donor* meant only to gratify the firſt *Donee*, and his Poſterity, without thinking himſelf concerned with the Parents or Anceſtors of his Vaſſal.

As to the Succeſſion of Collaterals, there was ſome thing very odd and ſingular in the Feudal Law, but for underſtanding of it, it's fit to know that *Feus* were thereby divided into *Feuda antiqua aut paterna, & Feuda nova*; the firſt is (in *Scotland*) called *Heritage*, and the laſt is termed *Conqueſt.*

Now with Reſpect to the former, there was indeed Place for the Succeſſion of Collaterals, and all Brothers, whether of the full Blood or half Blood, or whether German or Conſanguinean, ſucceeded therein Share and Share alike.

But then as to a *Feudum Novum*, (*u*) becauſe the *Feu* was originally given for military Service, and becauſe the Superior, by giving of it, meant only to gratify or inrich the Vaſſal, and his Lineage or Poſterity; and Brothers not being of his Poſterity, nor deſcended of the Vaſſal, they, as well as all other Collaterals were abſolutely precluded from ſucceeding to him: So when a Man at firſt got a *Feu*, diſponed to him by the Superior, if he had Children they ſucceeded to him; but then if he had not any, tho' he had had 20 Brothers, and as many Siſters; yet theſe were all abſolutely excluded from the Succeſſion; and if it be asked what then came of this *New Feu?* The Anſwer is, that it returned to the Superior, becauſe there was none lineally deſcended of the Vaſſal, who might ſucceed to it: But in all theſe Particulars, the *Scots* have receded from the Feudal Law, as will appear when the Scheme of the *Scottiſh* Succeſſion ſhall be afterwards opened.

SUCCESSION by the Law of England.

BEcauſe the Order of Succeſſion obſerved in *England* doth very much quadrate with that which is followed in *Scotland*; and conſidering that in Conſequence of the Marriages betwixt the *Scots* and *Engliſh*, Queſtions may frequently ariſe with regard to the Laws of either Country, touching the Matter of Succeſſion: It may not therefore be amiſs here, before explaining the *Scotiſh* Order of Succeſſion, to point out ſome of the moſt material Particulars, wherein the Courſe of the *Engliſh Succeſſion* is diverted from it. And 1ſt, with Reſpect to Deſcendents; if Children are not born in lawful Wedlock, they cannot be legitimated by any ſubſequent Marriage, at leaſt by the Law of *England*, they are precluded from ſucceeding as lawful Children, altho' they were ſo legitimated.

2*dly*, Sir *William Noy*, Attorney General to King *Charles* I. in his *Maxims* maketh *Purchaſe* to deſcend to the Heirs of the Blood of the firſt *Purchaſer*, and not to the next in Blood of him who was laſt ſeized: And thus, if a Father purchaſed Lands, and they deſcended to the Son, and if the Son, being entred ſhould die without Heirs of his own Body,

(*u*) Conqueſt.

in that Caſe, it is ſaid, that the Lands would deſcend to the Heirs of the Mother or the Father, or to the Heirs of the Father's Father, and not to the Heirs of the Mother of the Son; and the Reaſon of this Preference is, that tho' the laſt-mentioned Heirs are more near by Blood than the former to the Perſon laſt inveſted, yet they are poſtponed or precluded from the Succeſſion as not being of the Blood of the firſt Purchaſer.

3*dly*, There is a Cuſtom in the County of *Kent*, known by the Term of *Gavel-Kind* (which is as much as to ſay, Gave all Kind) by which all the Sons ſucceed equally, and if a Brother dies without Iſſue, his Brethren ſucceed to him after the ſame Manner; that is to ſay, they are permitted to inherit as *Heirs Portioners*. (*).

And 4*thly*, There is a particular Cuſtom in ſome *Ancient Boroughs*, by which the youngeſt Son inherits *before*, or is preferred to the eldeſt; and this is called *Burgh Engliſh*, or *Borough Engliſh*, becauſe that Cuſtom is ſaid to have taken its firſt Riſe in *England*.

From Deſcendents, the next Step ſhould be to the Succeſſion of *Collaterals*, for in *it* the *Engliſh* have ſome Particulars peculiar to themſelves; but theſe can hardly be explained in few Words, without firſt ſhowing what ſeems to be pretty remarkable among them with reſpect to Aſcendents.

As to whom there is no Preference given to the Succeſſion *in linea recta*; and thus a *Father* doth not ſucceed to his own Son, but the *Father*'s *Brother*, or Son's *Uncle* is preferred to the Father: And this ſeems to be ſomewhat ſingular, conſidering that the Father is a Degree nearer in Blood, than the Uncle or Father's Brother.

And yet the Father may *mediately*, tho' he cannot *immediately* ſucceed to his own Son; for if the Uncle died without Children, the Father would be Heir to his own Brother, the Son's Uncle, and ſo would ſucceed to ſuch Eſtates, as had faln to the Uncle by the Demiſe of his Nephew.

In the Succeſſion of *Collaterals*, the *Engliſh* do in this differ from the *Scots*, that if in *England*, a Man being twice married, ſhould have one Son of the *firſt*, and two or more Sons by the ſecond Marriage, if the

(*) Parceners.

Son

Son of the firſt Marriage, (being once entered to his Father's Inheritance) ſhould die without Iſſue, the Father could not ſucceed to him, as has been already noticed: Neither would his *Brother's Conſanguinean*, or the Sons of the 2d Marriage be his Succeſſors, theſe being of the *half Blood*; and therefore the Succeſſion would devolve upon the Father's Brother, he being reckoned the firſt of the whole Blood.

But yet if the Father's Brother ſhould die without Iſſue, the Father would ſucceed to him, as has been already ſhown. And again, if the Father ſhould die, the Son of the ſecond Marriage (who formerly had been excluded from ſucceeding to his Brother, the Son of the firſt Marriage, as being only of the half Blood) would now ſucceed in the Inheritance to his Father's Brother, for (ſay the *Engliſh* after the Father) he is the firſt Kinſman to his Uncle.

But here it's obſervable, that if the above-mentioned Son of the firſt Marriage had died without being inveſted or entered to his Father's Heritage; in that Caſe his Brother's Conſanguinean would excluded the Uncle, and been preferred to him in the Succeſſion to their Father's Inheritance.

And for clearing this Point of the *Engliſh* Law, it's fit to notice, that the above-mentioned Diſtinction of the *Feudum antiquum*, and *Feudum Novum*, or of Heritage, and *Conqueſt* or *Purchaſe*, is obſerved in *England* as well as in *Scotland*; and with Reſpect to the former, there is in *England* no Succeſſion of Collaterals, unleſs they be of the full Blood; but yet with Regard to the latter, if *Titius* ſhould purchaſe an Eſtate, and die without Iſſue, failing Brothers *German*, a Brother *Conſanguinean* would ſucceed to *Titius* by the Laws of *England*.

But I find from *Noy*'s *Maxims*, that a Siſter of the whole Blood, would ſucceed to her elder Brother who had entered after the Death of his Father, and that ſhe would inherit before any Brother of the half Blood.

And with Regard to the *Collateral Succeſſion in Conqueſt* there is this further Difference betwixt the *Scotch* and *Engliſh*, that if in *England* there were four Brothers, and the third Brother ſhould die without any Children; in that Caſe his *Conqueſt* would not go to the ſecond or immediate elder Brother; neither would it fall to the fourth or immediate

ate younger Brother, but dropping the *one*, and paſſing over the *other*, the ſame would aſcend to the firſt and eldeſt of the four Brethren. And this obtains among the *Engliſh*, *ob Prærogativam primogenituræ, & ætatis, & Sanguinis dignitatem.*

But the diſtinguiſhing Diverſities between the *Engliſh Order of Deſcent*, and the *Courſe of the Scottiſh Succeſſion*, as well as their Analogy and Agreement will more plainly appear by comparing the following *Order* uſed in *England*, with the ſubſequent Plan of Succeſſion, as the ſame is preſently obſerved in *Scotland*; and therefore with Regard to *England*, all Lands in *Fee-ſimple*, or in *Feodo Simplici* do deſcend;

1ſt, To Sons, according to their Seniority, the eldeſt or elder, and his Iſſue always excluding the younger or youngeſt, and their Iſſue; and for Want of Sons the *Fee-Simple* deſcends next to all the Daughters equally as Heirs Parceners. 2*dly*, To the eldeſt Brother of the whole Blood and his Heirs, and for Want of ſuch to the Siſter or Siſters of the whole Blood and to her, or their Iſſue. 3*dly*, To an Uncle, and his Iſſue, and then to Aunt or Aunts, and their Iſſue. 4*ly*, To the Father. 5*ly*, To the half Blood and their Iſſue. And 6*ly*, for Want of *Uncle*, *Father*, and *half Blood*, and their *Iſſue*, then to the next of Kin of the Collateral Line. *See* Wood's *Inſtitute*, *fol.* 218.

Now by recollecting what has been ſaid with Reſpect to the *Engliſh* Order of Deſcent, the ſubſequent Concluſions may be eaſily gathered, and do ſerve to clear the Matter, and are as follow; *viz.* 1*mo*, *That in England all Deſcent is either by Common Law, by Cuſtom, or by Statute.*

And thus the immediate preceding *Order of Deſcent*, is by Common Law, as the above-mentioned *Gavel-Kind*, and *Borrough Engliſh*, are referred to Cuſtom, and *Deſcents of Eſtates* in Fee-Tail, or the *Talliata Succeſſio* was introduced by Statute of *Weſtminſter* in the Reign of *Edward* the 1*ſt*, as has been formerly obſerved.

2*do*, *One muſt be Heir to him that was laſt actually ſeized*; and thus ſuppoſing Son and Daughter by one Venter, and a Son by another, if the eldeſt Son was entred, and died without Iſſue, the *Fee-Simple* would deſcend to the Daughter of the firſt Marriage, his Siſter; but if he had died

died without Iſſue, and before actual Seiſin, the ſame would deſcend to the ſaid Son of the other Venter or ſecond Marriage, as being Heir to his Father.

3*tio*, *None can inherit Lands as Heir, but only the Blood of the firſt Purchaſer*; and thus the Father's Purchaſes never deſcend to the Blood of the Mother, *& Vice Verſa*, where Lands do deſcend from the Part of the Mother, the Blood of the Father is never to inherit: And my *Lord Stair*, (*u*) *in his Title of Succeſſion, very juſtly obſerves, that this Rule of Paterna Paternis, & Materna Maternis*, is abundantly reaſonable as well as agreeable to natural Equity.

But yet if a Son purchaſed Lands, for Want of Heirs on the Part of the Father, they would deſcend to thoſe on the Part of the Mother; for even the Mother's Heirs are conſtructed to be of the Blood of her Son, who here is ſuppoſed to have been the *firſt Purchaſer*; and therefore *Diſtinguendum* where the *Fee-Simple* is of the *Son*'s *Purchaſe*, and where the ſame only cometh to him by *Deſcent*, either on the Part of his Father, or yet on the Part of his Mother; but more of this immediately, for

4*to*, There is a Diſtinction betwixt *the next of Kin by Right of Repreſentation, and the next of Kin by Right Propinquity*: And thus a Grand-Child doth in ſome Caſes exclude a Brother, but in others the Brother is preferable to the Grand-Child; as for Example, if a Man dies, leaving two Sons, *Titius* and *Mevius*; *Titius* purchaſeth a *Fee-Simple*, and dies without Iſſue; *Mevius* hath two Sons *Seius* and *Sempronius*, *Seius* the eldeſt dies leaving Iſſue; now this Iſſue of *Seius*, tho' in Degree more remote than *Sempronius*, doth inherit before him; becauſe ſaid *Iſſue* doth repreſent his Father *Seius*, who (had he lived) was legally Heir to the above-mentioned *Titius*.

But yet had theſe Lands been limited to the next of Blood by *Conveyance*, or had they come otherwiſe than by *Deſcent*; in either Caſe *Sempronius* would firſt take, as being next in *Propinquity*, tho' not legally Heir by *Deſcent*; And this likewiſe ſhows the Diverſity betwixt *next of Blood inheritable by Deſcent, and next of Blood capable by Purchaſe*.

(*u*) See Preface.

5*to*,

5*to*, No body can have *Fee-Simple by Deſcent, as Heir to another, unleſs he be Heir of the whole Blood:* V. g. If *Titius* had two Sons of diverſe Venters, if the eldeſt Son purchaſed a *Fee-Simple*, and then died without Iſſue, his Uncle, and not the ſurviving Brother of the half Blood would be his Heir. But it's obſerveable, that *Fee-Simple Lands of the Crown*, and *Dignities*, fall not under this Concluſion; for as to theſe the half Blood is no Impediment to Deſcent.

And thus, as for the Information of my own Countrymen, I have endeavoured to be as ſuccinct and clear touching the *Engliſh Deſcent* as could reaſonably be expected from one that has been ſo ſhort Time in *England*; ſo on the other Hand, for the Benefit of ſuch as it may concern in *particular*, as well as for ſatisfying the Curioſity of the good People of *England* in general, I ſhall by and by endeavour, in a few Words, to ſet the *Scottiſh* Order of Succeſſion in ſuch a Light, as any attentive Reader may very eaſily underſtand it.

And therefore to begin, it's neceſſary to premiſe what *Juſtinian* affirms, *Namely*, that *Hæreditas Nihil aliud eſt quam Succeſſio in univerſum Jus quod Defunctus habuerat; and ſo an Heir is defined to be he who ſucceeds univerſally to all that belonged to the Defunct.*

But then there are ſundry Kinds of Heirs in *Scotland*, as Heir of Line, Heir of Conqueſt, Heir Male, Heir of *Tailzie*, Heir of Proviſion; and even an Executor is reckon'd to be *Hæres in Mobilibus.*

An Heir of Line is he who ſucceeds lineally according to the Right of Blood.

An Heir Male is the neareſt Male Child that is intitled to ſucceed.

An Heir of Conqueſt is he who ſucceeds to what his Anceſtor acquired, *otherwiſe than by Succeſſion.*

An Heir of Tailzie, is he to whom Lands are tailzied, after the Manner above-mentioned.

An Heir of Proviſion, is he who ſucceeds not ſo much by Right of Blood, as by the Proviſion or Tenor of the Inveſtiture.

An Executor is he who executes or performs the Will of the Defunct, as expreſſed in his Teſtament.

But of all theſe Heirs, the Heir of Line is the moſt conſiderable, and he cannot be known without firſt underſtanding the Degrees of Succeſſion, becauſe his Right depends upon the *Proximity of Blood.*

The firſt Degree of Succeſſion then, according to Proximity of Blood, comprehendeth *Deſcendants*, of which the firſt are *Sons* and *Daughters.*

But then the eldeſt Son, tho' only legitimated by a ſubſequent Marriage excludeth all the reſt, and the younger Sons (tho' of different Marriages) are conſecutively preferred to one another, and to all the Daughters.

And if there are only Daughters, they are then Heirs *Portioners* (*x*) and do ſucceed all equally, and *in Capita*, excepting where the Rights are indiviſible; and thus the eldeſt Heir female is preferred, to *Titles*, *Meſſuages*, *Caſtles*, *Fortalices* and Superiorities, without any Diviſion of them.

Failing Children, the Succeſſion next devolves upon Grand-Children, or Great-Grand-Children, and runs downward as long as Deſcendants *in linea recta* can be found, and they all ſucceed one to another, after the ſame Manner, and with the ſame Parity, and Preference in each Degree, that has been already related of Children.

If there be no Deſcendants, neither exiſting, nor *in ſpe*, there is then Place for the *Collateral Succeſſion*, in which the firſt Degree is Brothers and Siſters, but the Brothers exclude the Siſters, and a Brother German is preferred to a Brother Conſanguinean; for the whole Blood is preferable to the half Blood, and a Brother by the Father excludes a Brother by the Mother; for there is no Succeſſion in *Scotland* by the Mother Side.

And here it's obſerveable, that there is a Diſtinction uſed in *Scotland*, which is there followed as a certain Rule, to wit, *That Conqueſt muſt aſcend, and Heritage deſcend*; and thus ſuppoſing the above-mentioned Caſe of four Brethren, and the third Brother dying, the immediate elder would be his Heir of *Conqueſt*, but the next younger, or fourth Brother would ſucceed to the Defunct in his *Heritage*, ſo that the eldeſt or firſt Brother would have no Share in either the one or the other.

(*x*) *Parceners.*

And

And yet in *Scotland*, ſuch is the Favour of Deſcendants *in linea recta*; ſuch the Prerogative of Primogeniture, or which is all one, ſuch is the *Right of Repreſentation* allowed there, that the Great-Grand-Child of the eldeſt Son is preferable to all Collaterals, and would ſucceed to the *Heritage* of his Great-Grand-Father, in Excluſion of the Great-Grand-Father's ſecond or only Brother, tho' of the full Blood.

But if there are no *Deſcendants*, nor no *Brothers* nor *Siſters*, either *German*, nor *Conſanguinean*, then the Courſe of Succeſſion *reverts*, and *aſcends firſt* to the Defunct's own Father, and ſubſequently to his Brothers and Siſters one after another; and Failing the Father and his Brothers, and Siſters, it next aſcends to the Grand-Father and his Brothers and Siſters in the ſame Order; and after theſe the Succeſſion may ſtill further aſcend to the Great-Grand-Father, and his Brothers and Siſters conſecutively one after another; and ſo upwards as long as any Propinquity of Blood can be inſtructed.

But as the Diſtinction betwixt *Heritage* and *Conqueſt* maketh one Alteration in the Courſe of Succeſſion; ſo the Difference betwixt *Heritable* or *real Rights* and *Moveables* (*y*) doth occaſion another Variation in it.

For in Moveables, the Succeſſion follows the Courſe of Nature, ſo that all thoſe of the ſame Degree ſucceed equally; the eldeſt ſecludeth not the younger, nor are the Males preferred to Females, and in Moveables there is no *Right of Repreſentation*, as there is in Heritage.

Tho' the Heir of Line excludes all other Heirs, as to the Heritage, yet if he be the Heir of a *Prelate*, *Baron* or *Burgeſs*, he has alſo Right to Heirſhip Moveables, theſe being the beſt of every Kind; ſo that the Heir of Line would be intitled to the beſt *Bed*, the beſt *Sword*, the beſt *Horſe* and the like, but to no more of the Moveables.

If a Man having no Heirs, dies inteſtate, then the King ſucceeds to him as *Ultimus Heres*; ſo that failing all Deſcendants, Collaterals and Aſcendants, the Sovereign ſucceeds to the Defunct both in his Heritage and Moveables, for *Quod Nullius eſt, eſt Domini Regis.*

Yet as the ſaid Heirs ſucceed univerſally to all that belonged to the Defunct, ſo this Succeſſion reſpectively devolves upon them *cum ſuo*

(*y*) *Perſonal Eſtate.*

onere, that is, with the Burden of the Payment of all the Defunct's Debts; for by attaining his Aſſets, they become perſonally liable for his Debts; *Nam quem ſequitur Commodum eum debet ſequi Incommodum.*

But then as the Defunct's Lands and Goods (but not the King's) are only liable to Creditors in the Caſe of an *Ultimus Hæres*; ſo if any of the other Heirs ſhall enter upon the Heritage *cum Beneficio Inventarii*, or ſhall regularly confirm the Defunct's Moveables, *that is to ſay*, if they ſhall make up full and faithful Inventories of all the Defunct's Means and Eſtates within the Time, and after ſuch Manner as the Law directs, in that Caſe, they are only liable to Creditors *in Valorem*, or for the Value and Contents of theſe Inventories; but if no ſuch Inventories are made and given up, the Heir entering, or the Perſon intromitting, will be ſimply liable for all the Defunct's Debts and Deeds: And therefore every Heir has Year and Day allowed him to deliberate whether he will enter (ꝛ), and he needs never enter Heir unleſs he pleaſes; and if he never enters he will never be liable perſonally for his Anceſtor's Debts, unleſs he do ſome Fact or Deed that is by Law equiparate to the *entring Heir*; and what ſuch Facts are, ſhall be afterwards opened.

But then his lying out unentred will not hinder a Creditor from obtaining ſuch Payment and Satisfaction as the Anceſtor's Aſſets could afford, becauſe he the Creditor is allowed to evict the Anceſtor's *Heritable Rights*, by an Adjuduation (*a*) to be deduced upon the *Ground of Debt*, and a *Charge to enter Heir*, to be executed againſt the Perſon who ſhould be the Heir, and likewiſe to carry off the Defunct's Moveables, by confirming himſelf Executor Creditor therein, after ſuch Form as the Law directs.

And again, if the Perſon who ſhould be Heir, reſolves to lie out unentred, and nevertheleſs immixeth himſelf with his Anceſtors Heritage, or Intromits with any of his *Heirſhip Moveables*; or for preventing his being entred Heir, hath *ab ante* accepted of a Diſpoſition to any Part of his Predeceſſor's Inheritance; theſe ſeveral Facts reſolve into two ſeparate *paſſive Titles*; the former is called a *Geſtio pro hærede*; and the latter

(ꝛ) *Annus deliberandi.* (*a*) Adjudication on what? See p.

a Succeſſion *Titulo lucrativo poſt contractum Debitum*; and the Effect of either, is to ſubject the Apparent Heir for all his Predeceſſors (*b*) Debts after the ſame Manner as if he had been actually entered Heir.

And tho' both theſe *Paſſive Titles* relate only to *apparent Heirs*; yet no Perſon whatſoever muſt intromit with any of the Defunct's Moveables, without ſuch Inventory and Confirmation as is before mentioned, or elſe he will be univerſally ſubjected to all the Defunct's Debts, and that in Conſequence of a third *paſſive Title*, which is termed *vitious Intromiſſion*.

This paſſive Title of *vitious Intromiſſion* has been introduced *ob terrorem*, and is ſo very rigorous, that it's frequently reſtricted to the Value of what has been intromitted with, that is to ſay, the Intromitter is no further ſubjected upon it, than for what he really received.

But where a Man is not afraid of theſe *paſſive Titles*, and reſolves to enter Heir, and to take his Hazard of all his Anceſtors Debts, in that Caſe there is a Brieve (*c*) iſſued out of the Chancery, which is a Command from the King to the Sheriff or Judge ordinary to cauſe to try by a Jury of fifteen ſworn Men, *whether the Raiſer of the Brief be the next Heir to the Defunct*.

And as this is the chief Head of the Brief, ſo the Propinquity of Blood muſt therefore be proved before the Jury; but all that the Witneſſes are required to ſwear is, that they know *That the Raiſer of the Brief is habit and repute Heir in ſuch a Degree to the Defunct, and that they believe him to be ſuch.*

However there are ſundry other Points in the Brief, *viz.* When the Defunct died? And if he died laſt veſted and ſeized at the King's Peace? Of whom the Lands held *in Capite*? And by what Manner of Holding? In whoſe Hands the Lands are at preſent? How and by what

(*b*) In *England* there is this Difference betwixt *Anceſtor* and *Predeceſſor*; that the former is applied to a natural Body, and the other to a Body politick *or corporate*; and thus they ſay *Henry* or *Edward*, and their Anceſtors; but the Biſhop of *Canterbury*, or Lord Mayor, and their Predeceſſors; however this Diſtinction is not noticed in *Scotland*, and ſo the Words are here uſed as ſynonymous. (*c*) So called from the Word *Breve*, becauſe it contains much in little, and it is either general or ſpecial, but the latter comprehends the Heads of the former.

Ser-

Service? What is their old (*d*) and new Extent (*e*)? And whether the Raiſer of the Brieve be of lawful Age.

To all which the Jury makes a particular Anſwer or Return, which is called a *Retour*, and at the ſame time ſerves the Raiſer of the Brief Heir to his Anceſtor in Terms of a Claim or Petition, preſented by him to them for that Effect.

And upon this Service, or rather in Vertue of *Precepts* iſſued out of the Chancery upon the ſaid *Retour*, the Perſon *Retoured* is entered, and infeft in the Lands and others, to which he was *ſpecially* ſerved Heir.

And thus I leave the lawful Heir infeft entered, and in Poſſeſſion of the *Natale ſolum*, or Inheritance of his Anceſtors, after having traced his *Jus Sanguinis*, or Right of Succeſſion thorough the Law of Nature, Law of *Moſes*, Law of Nations; and alſo explicated the ſame upon the Principles of the Civil, Feudal, *Engliſh* and *Scottiſh* Laws.

(*d*) An ancient Valuation made in Time of Peace, and very low. (*e*) A latter Valuation made in Time of War, and more high.

ACTIONS, JUDGMENTS,

AND THE

EXECUTORIALS thereupon,

WITH THE

DESTITUTIONS or EXTINCTIONS

OF THE SAME.

PART III.

OBligations are the *productive Cauſe* of Actions, and ſo the *latter* are to be here treated of after the *former* have been already explained.

Actions admit of many *Diviſions*, but the Doctors are not agreed about the *Definition* of them.

However an *Action* is here defined to be *a Power or Faculty of trying our Right in Judgment, or a Right of demanding judicially, what ought to be given or reſtored to us.*

The moſt remarkable Diviſions of Actions by the Civil Law, are that *Aliæ ſunt in rem, aliæ in perſonam, aliæ Stricti Juris, aliæ bonæ fidei, aliæ directæ, aliæ Utiles, aliæ ex delicto, aliæ Actiones Injuriarum.*

Now the firſt is alſo the principal Diviſion that is here mentioned, and it proceeds upon the very Subject Matter of the Actions; for an *Actio in rem*, or a *real Action*, is that which relateth to *Things* themſelves, or to *Dominium*, Property and real Rights: But a perſonal Action doth

only lie againſt the *Obligant perſonally*, or againſt his Heirs, who are, in Conſtruction of Law, one and the ſame Perſon with himſelf.

Where the Action is *Stricti Juris*, the Judge is limited to the ſtrict Preſcript of the Obligation or Contract upon which the Action is founded; but in *Actions bonæ fidei* (as in Depoſitations) the Judge is at Liberty to weigh the Circumſtances, and to decide according to Equity, altho' nothing of that had been thought upon, nor ſtipulated by the Parties.

Actiones directæ were theſe which were founded upon the expreſs Words of the *Reſcripts*, *Edicts*, or *Imperial Conſtitutions*; but the *Actiones Utiles* were introduced *utilitatis cauſa*; and ſo had only their Foundation in the *Meaning*, but not in the expreſs Words of the Law.

There was this ſignal Difference betwixt the *Actiones ex delicto* and the *Actiones injuriarum*, that the former were competent to *Heirs*, and the latter were not; for (ſaid the Law) in theſe the Heir ſeemed not ſo much to ſue for *Money* as for *Revenge*; and upon that Conſideration his Action was denied.

Upon the ſame Ground it was, that tho' ſome Donations were revocable by the *Donor*, upon Account of the *Donee's Ingratitude*, yet the Heir had not the ſame Privilege of *Revoking* them, becauſe the Law conſtructed his Revocation to be merely an Act of Revenge, and ſo would not countenance it.

Altho' theſe Actions are only as it were adopted from the *Civil* into the *Scots Laws*; yet there be ſundry others which are properly their own, as being in a ſpecial Manner adapted to their Forms and Conſtitution.

And the moſt comprehenſive Diviſion of theſe, is that whereby they are divided into *Ordinary* and *Extraordinary*, *Civil* and *Criminal Actions*.

An extraordinary Action is that which is intended for reſcinding any Deed or Bargain upon the Heads of Fraud, Falſhood or the like; and all others (excepting ſuch as are *reciſſory* or *Criminal*) are termed *Ordinary Actions*.

A *Civil Action* is that wherein a Man only ſues his own civil or private Right; but a criminal Action is where he, with Concourſe of his Ma-

Majeſty's Advocate (*f*), (for his Highneſs's Intereſt) doth proſecute any Crime, *ob Vindictam publicam*; and leſt private Perſons ſhould be calumnious or groundleſly vexatious by too many criminal Proſecutions, they are not therefore allowed to proſecute Crimes without the Concurrence of his Majeſty's Advocate; but then as he ſeldom refuſeth to concur, ſo the Dignity of his Office puts him beyond the like Suſpicion.

The private Proſecutor is alſo obliged to find Bail to inſiſt, or to return the criminal Letters duly executed.

As to the *Ordinary Civil Actions* having ſpecial Names, theſe following are the moſt remarkable; *viz.* Where a Man has an *heritable Bond*, or any real Right to, or upon Lands, the Rents and Profits of them are ordinarily recovered by an Action of *Mailes* and *Duties*.

Tenants are removed from Lands by *Actions of removing*, and the Decreets (*g*) obtained therein, are the Warrants of Letters, charging Sheriffs (in his Majeſty's Name) to eject the Tenants (who are therein called violent Poſſeſſors) by open Force, and theſe Executorials are called *Letters of Ejection*.

Tenants are compelled to grind their Corns at the Mills to which they are thirled, by *Actions of abſtracted Multures*.

Apparent Heirs being allowed Year and Day to deliberate whether they will enter Heirs to their Anceſtors, are for that Purpoſe permitted to force Perſons to make *Exhibits* of all Writes or Rights granted to their Anceſtors, and that by Actions called Exhibitions *ad deliberandum*.

Here the Writes are only exhibited, but not delivered; but in ſome Caſes Exhibitions do alſo conclude Delivery of the Thing craved to be exhibited.

A Man purchaſing a ſmall Parcel of Lands, cannot always get the Rights or Progreſs of the whole Lordſhip or Barony delivered to him: But he will be allowed authentick Copies of them, which will be declared as ſufficient for his Security, as the principal Writes or Progreſſes could have been; and this is done by ſuing an Action of *Tranſumpt*, ſo called, becauſe the Writes are to be judicially tranſumed, compared, and copied.

(*f*) Attorney General. (*g*) Awards.

When a Man finds *Surety* and *Lawborrows*, that is to ſay, where he is compelled to find Bail to keep the Peace under a Penalty; in that Caſe both he and his Cautioner (*h*) may be overtaken by an Action of *Contravention of Lawborrows*.

Sometimes Perſons have Reaſon to purſue *penal Actions*, wherein they conclude not only for Repetition of that *quod Patrimonio abeſt*; but likewiſe for extraordinary Damages, and Reparation by Way of *Penalty*.

For avoiding Tautologies, *Multipli-poyndings*, *Spulzies*, and *Forthcomings*, which might be here ſpoke of, muſt nevertheleſs be thrown over, until the *Executorials*, which are the Ground or Warrants of theſe Actions, come to be mentioned.

The ſame Thing that is done in *England* by *Bills of Revivor*, is accompliſhed in *Scotland* by Summondſes of *Walkning*.

But here it is obſervable, that as Obligations are the efficient Cauſe of Actions, ſo there may be as many Actions as there can be Contracts or Obligations.

And again, as theſe Contracts or Obligations are not all bound up under ſpecial Names, ſo neither can Actions; but this Loſs or Defect is ſupplied by adjecting *Concluſions of Declarator*, to ſuch Actions as have no ſpecial Names.

And theſe *Actions of Declarator* are ſo called, becauſe in them the Plaintiff concludes, that the Right and Title to a Sum of Money, or to any other particular Thing or Subject, ſhould be declared in his Favour.

Now theſe, and all other Actions named, or to be named, are in *Scotland* carried on by Way of Summonds.

This Summonds (like that mentioned in the firſt Part) is of the Nature of an *Ariſtotelian* Syllogiſm, and the chief Parts of it are, 1*ſt*, the Purſuer's (*i*) Intereſt or Title; 2*dly*, the Ground or Medium upon which the Defendant is liable; 3*dly*, the Inference or Concluſion: And the expreſſing of theſe Particulars is called the *libelling of a Summonds*.

As for Inſtance; if a Man were to ſue the above-mentioned Action of *Mails and Duties*, he behoved to libel upon his heritable Bond, and Infeftment, that is to ſay, he ought to *Narrate* (*k*) in the firſt Place,

That *Seyus*, by his heritable Bond (of ſuch a Date) bound and obliged him to infeft the Complainer in all and hail (*l*) the Lands of

(*h*) Bail. (*i*) Plantiff. (*k*) Recite. (*l*) Whole.

(here

(here the Lands are to be expreſſed as they are ſet down in the heritable Bond,) and that the Complainer was accordingly infeft thereupon conform to his Seiſin, duly regiſtrate the Day of and Years.

And then he *ſubſums*, that *B. C.* and *D.* are Tenants and Poſſeſſors of Said Lands, and that he the Complainer has good and undoubted Right and Title to the *Mails and Dueties* (*m*) thereof; and that in Vertue of his heritable Bond above deduced, and that the Said Tenants are liable to him therefore.

And therefore he *concludes* againſt the Tenants, and the Grantor of the heritable Bond for his Intereſt, that they ought and ſhould be decerned and ordained to make Payment and Satisfaction to the Complainer of the Mails and the Dueties above-mentioned, payable out of the Lands and others above expreſſed.

And after this, follows the *Will* of the Summonds, which is of an unvariable Stile, being only a Warrant or Command for citing the Defendants to appear at a certain Day and Place, and expreſſing the Number of Days, upon which they are to be cited, and the Court before which they are to appear.

From all which it appears, that the Rules ordinarily given for the forming of Syllogiſms, are neceſſary to be remembered in the drawing of Summons's; for if the Premiſſes be not legal, relevant, warrantable and inſtructed; or if the Concluſion be not fairly contained in the Premiſſes, in ſuch Caſes it is plain that the Summonds will be overturned, and that ſuch eluſory Actions muſt neceſſarily fall to the Ground.

And here it is alſo noticeable, that the Plaintiff may libel as many ſeparate Actions, and alſo call or convene as many different Defendants in one and the ſame Summonds, as he ſhall think convenient: But then after Litiſconteſtation, that is, after the Relevance is ſettled, any of the Defendants is intitled to inſiſt for having the Proceſs brought to an Iſſue, and finally determined.

The Evidence neceſſary for ſupporting theſe Actions, is *either by Writ, by Oath of Party, by Witneſſes, or by Preſumptions*; as the Nature of the Action doth require.

(*m*) Rents and Profits.

But it is here obſervable, that during the ancient Simplicity of Men and Manners, *Probation by Witneſſes* was ſuſtained in all Caſes: But after that *primitive Simplicity* had decay'd, and that Equivocation and Inſincerity had grown up in its Place, the *Falſeneſs of Men* forced the *Scottiſh* Law-Givers to allow nothing above 100 *l.* to be proved without Writ and verbal Promiſes only to be proved by Oath of the Maker, becauſe the intentional Import of Words may be eaſily miſtaken by the Hearers; and it were to be wiſhed that Experience did not every where ſhow too much Reaſon for reſtraining as much as poſſible, the ancient Method of proving every Thing by Witneſſes.

With Reſpect to *Oath of Party*, no Man's Right can be taken away by his Party's Oath, unleſs he who has the Right ſhall refer the ſame to his Adverſary's Oath; and by ſo doing, he precludes himſelf from all further Evidence; and in this Senſe they apply that Expreſſion, *that an Oath ſhould be the End of Controverſy.*

But then any Party is always (*pendente lite*) obliged either to make Oath when required, or elſe to ſuccumb in the Action; or at leſt in the Point referred to his Oath.

That of *Swearing Anſwers* is not uſed in *Scotland*, becauſe what a Party ſwears to, admits of no contrary Probation by Witneſſes, leaſt (for the Reaſons mentioned in the firſt Part of this Paper) ſuch contrary Oaths ſhould reſolve into inextricable Circles.

But what ſupplies the Thing, and often prevents many Perjuries, *is this*, that either Party is always (*pendente lite*) obliged judicially to *confeſs* or *deny* (but not upon Oath) ſuch Particulars as are put to him; and this doth not hinder the other Party from being allowed to prove the quite reverſe of what is ſo confeſſed or denied; and if that he can do, he is always intitled to extraordinary Expences in Name of Damages; for the Preſumption is, that he who would ſolemnly confeſs or deny any Thing wrongfully in Judgment, would alſo have ſworn after the like Manner, had he been at Liberty ſo to do.

Sometimes Parties are allowed to make Oaths *in Litem*, by which they are intitled not only to the *real*, but alſo to *pretium Affectionis*, or the imaginary Value put by the true Owner upon the Thing unduly abſtracted from him.

And thus, if *Sempronius* had forcibly or clandeſtinely carried away, and diſpoſed of *Seyus's* Horſe, if he could prove that *Sempronius* had ſo abſtracted the Horſe, it would be referred to *Seyus's* own Oath, what the Horſe was worth, and *Seyus* would be regularly intitled to recover from *Sempronius* ſuch a Value as he (*Seyus*) ſhould put upon the Horſe. But yet, ſuch Oaths are taxable by the Judge, where they appear to be very exorbitant.

They diſtinguiſh in *Scotland* betwixt a *Simple* and *Qualified Oath*; in the later the *Quality* is ſuſtained where it is *intrinſick*, that is to ſay, *where it is a Part of the Condition, or neceſſarily implied in the Nature of the Thing.*

And thus, if the Price of a Horſe were referred to the Buyer's Oath, and if he ſhould depone with this *Quality*, that the Price was indeed promiſed, but upon this Condition, *viz.* that the Horſe ſhould be neither blind nor lame; this Quality would be reckoned *intrinſick*: So that if either of the two came out to be the Caſe, the Buyer would be liberated from his Promiſe.

But if inſtead of ſuch a Quality as this, the Buyer had only qualified his Oath after the following Manner, to wit, that the particular Price was indeed promiſed, *but at the ſame time, the Seller promiſed and obliged himſelf to give to the Buyer a Coach or Chariot, to be drawn by the ſaid Horſe which he had ſold to the Deponent*, this would be reckoned an *extrinſick Quality*, and would conſequently be juſtly repelled, unleſs the Verity of it were referred to the Seller's Oath, or at leaſt, unleſs the ſame could be otherways proved than by the Oath of the Buyer.

Now the End of all theſe *Actions*, *Summonds's*, *Evidence*, and *Oaths*, is to obtain a Decreet or Judgment in Conſequence of them.

And the Purport of ſuch a Judgment, is to reſcind or traverſe ſome *Deed*, *Decreet*, *Bargain*, or *Tranſaction*, or elſe to *Find*, *Decern*, and *Declare*, the *Right*, *Title*, and *Property* of any ſpecial *Thing* or *Subject* in Favour of ſome particular Perſon.

And the *legal Effect* of ſuch Judgments is, that upon them all Manner of Diligence and Execution, is directed againſt the *Perſon*, *Goods*, *Lands* and *Eſtate* of the Party decerned (*n*).

And the Incarceration of the Perſon or Body of the Debitor doth not hinder the Creditor, to obtain all Manner of Execution againſt his Lands,

(*n*) Found liable.

and

and Goods; and tho' the Debitor died in Priſon (*o*); yet that would not be conſtructed any Satisfaction for the Debt.

But yet if the Creditor once attained the peaceable Poſſeſſion of his Debitor's Lands, he could not thereafter touch either his Perſon or his Goods, unleſs theſe Lands were afterwards evicted from him, for ſome preferable Debt of the Debitor's, or that the ſame were found inſufficient for the Creditors's Payment.

The Diligence affecting Lands or Goods, is either *prohibitory* or *executive:*

The prohibitory Diligence affecting *Goods or Moveables*, is called an *Arreſtment* (*p*); and the Effect of this Arreſtment is to prohibit or diſcharge the Perſon in whoſe Hands the Debitor's Moveables are, to pay or deliver up the ſame, until the Executor of the Arreſtment be firſt ſatisfied.

And for that Purpoſe, he convenes the Perſon in whoſe Hands the Arreſtment was laid on, and alſo the principal Debitor for his Intereſt, *in an Action of Forthcoming*, in which Proceſs he obtains an Award for ſo much of the arreſted Goods or Sums of Money as may be ſufficient for his own Payment.

If after ſuch Arreſtment is laid on, the Arreſter proves negligent in bringing his Proceſs of forthcoming; in that Caſe the Perſon in whoſe Hands the Arreſtment is laid on, uſes to raiſe a Summonds of *Multiply Poynding*, wherein he concludes againſt all Parties concerned to compear for their Intereſts, and to hear and ſee the Party having the beſt Right, preferred to the Goods arreſted, and him (the Complainer) found only liable in once and ſingle Payment.

The *executive Diligence* affecting Moveables is called *Poynding* (*q*); and this doth ordinarily proceed upon Letters of Horning, commanding Meſſengers at Arms, *&c.* to poynd or diſtrenzie the Debitor's Moveables, and accordingly ſuch Moveables (*r*) being firſt valued or appraiſed, are afterwards poynded or diſtrenzed by the proper Officers, and then they are applied for the Creditor's Payment and Satisfaction.

But if the Creditor ſhall either careleſly, or out of Deſign, think fit to cauſe poind, or carry off more of the Debitor's Goods than are ſuf-

(*o*) Gaol (*p*) Attachment. (*q*) Diſtrenzying. (*r*) Perſonal Eſtate.

ficient

ficient for Payment of the Debt, contained in the Diligence; in that Caſe the Debitor (or the Perſon whoſe Goods are poinded) is intitled to bring an Action of Spulzy againſt the Poynder or Creditor, wherein he concludes for Reſtitution or Repayment of the Value or Prices of the Goods poinded; and likewiſe for Payment of a certain Sum, as the Profits which the Complainer might have got of his Goods *daily*, and *every Day* ſince their *Spulziation*, or ſince the ſame were unlawfully poinded.

In this Proceſs it is a Rule, that the ſpulzied Goods cannot be kept back, upon Pretext of the Debt due to the Spulzier, becauſe *Spoliatus eſt ante omnia reſtituendus.*

And becauſe *Poindings* are a rigorous Kind of Diligence; it is therefore often more eaſy and eligible to ſeize, apprehended or incarcerate, the Perſon of the Debitor, and that is ordinarily done by *Letters of Caption*, which are iſſued of Courſe, upon all Judgments or regiſtered Obligations.

The prohibitory Diligence affecting Lands or heritable Rights, is termed an *Inhibition*; and this Inhibition is *a perſonal Prohibition againſt the Party inhibited, diſcharging him from making any voluntary Alienations of his Lands or heritable Rights; and alſo from contracting any Debts*, ſo as to be Grounds for the legal Eviction of them, to the Prejudice of the Raiſer of the Letters of Inhibition.

The ſame Letters do alſo contain a *Prohibition* to the *Leiges*, that they preſume not to accept of any Purchaſes from the Perſon inhibited; and for putting the Lieges *in mala fide*, the Letters of Inhibition are executed againſt them, or publiſhed at the Mercat-Croſs of the Head Burgh of the Shire where the Perſon inhibited dwells; and the Inhibition ſo publiſhed, or rather the Inhibition with the Executions of it, muſt be regiſtrated (within 40 Days after the executing) and that either in the general Regiſter kept at *Edinburgh*, or elſe in the particular Regiſter of *Hornings and Inhibitions*, kept in the Shire where the Perſon inhibited dwells, or the major Part of his Lands lie; and if after all this is regularly done, any Perſon ſhall adventure to purchaſe Lands, or any heritable Right from the Perſon inhibited; ſuch a Purchaſer muſt lay his Account upon it, that his Purchaſe will be affected or burdened with the Sums contained in the executed Inhibition, the

ſame having been duly regiſtrated, that all the Lieges might have an Opportunity of ſeeing or knowing of it.

The executive Diligence affecting Lands or Heritable Rights is called an *Adjudication*, and did come in Place of an antiquated Diligence, called *Compriſing*.

An Adjudication is ſo termed, becauſe *the Creditor gets Lands adjudged, or awarded to him proportionally to his Sum*, with a fifth Part more in Place of Penalty, and becauſe the Creditor is neceſſitate to take Lands for his Money; and the Perſon adjudged from, is further liable for the *Compoſition* or Sum paid by the Adjudger, for obtaining a Charter or an Entry from the Superior of the Lands adjudged; and he (the Debitor) muſt alſo pay the Expences laid out in expeding an Infeftment, upon the Superior's Charter after it is ſo obtained from him by the Adjudger.

There are four different Kinds of theſe *Adjudications*, one redeemable in 5, another in 10; a 3d in ſeven Years, and a fourth without any Reverſion or Equity of Redemption.

The Adjudication that has no Reverſion, doth proceed upon a *Minute* (*ſ*) Contract or Obligation for diſponing irredeemably the Lands or elſe upon ſome ſuch Obligation, that conſiſts *in Facto*; and therefore this Adjudication is termed *Remedium extraordinarium*, or an Adjudication *ad Factum præſtandum*.

In *Scotland* a Man can never be legally declared a Bankrupt, unleſs it be inſtructed that he is inſolvent: And there are three Ingredients neceſſarily required, in Order to make out what they call a *Notour or legal Bankrupcy*; and theſe *are Diligence by Horning and Caption, and Inſolvence*, which two, when joined to any of the following Alternatives, *viz. Impriſonment, Abſconding, Taking the Benefit of a Privileged Place, or forcibly defending againſt Diligence*, are ſuſtained ſufficient to infer a *legal Bankrupcy*.

And then all voluntary Deeds made by the Bankrupt in Favour of any Creditor, at, or after, or ſixty Days before the legal Bankrupcy, *in farther Security*, or for Satisfaction of any Debt due to that Creditor, are

(*ſ*) Articles of Agreement.

ſo

ſo far declared void, as not to be any Ground for preferring him to the other Creditors of the Bankrupt.

And after the Debitor is once found and declared to be legally Bankrupt, his Lands are then judicially ſold by the Lords of Council and Seſſion; and either the Lands, or at leaſt the Price of them are proportionally divided among his Creditors, according to the Perfection and Priority of their Debts and Diligences.

For rendering theſe Judgments the more effectual, and that the Obtainers of them may be the better ſecured againſt all After-Game; nothing that could, or might been proponed in the firſt Inſtance, or before Extract by Way of Argument, Plea, or Defence, will be ſuſtained after Decreet has been extracted and given out to the Party; for after ſuch Extract (*t*) all ſuch Pleas and Defences fall to be rejected and repelled, as having been *Competent and Omitted.*

It is true, that there are many Exceptions from this Rule, and ſome of theſe too are in Appearance at the firſt View, almoſt as general and extenſive as the Rule it ſelf; as for Inſtance, competent and omitted is never to be ſuſtained againſt the Decreets of inferior Judicatures, becauſe the Procurators there, are not reckoned ſo skilful as the Advocates before the Lords of Council and Seſſion; and ſo becauſe there is no *Copia peritorum* to be found in inferior Courts, therefore Competent and Omitted cannot be pleaded in Bar of any Review of their Decrees: But then it is noticeable, that after *Extract*, no inferior Court can open or repeal its own Decreets.

Competent and *Omitted* is not ſuſtained againſt Minors, or Abſents, (*u*) for theſe are, upon relevant Reaſons, generally reſtored againſt all Decreets, upon their paying the neceſſary Expences beſtowed in obtaining, and for extracting of the ſame.

And tho' Minors (in whom Negligence is not puniſhable by Reaſon of their Want of Judgment to know their Hazard) ought regularly to be reſtored without paying Expences; yet *Majors* (*) being abſent, are ſeldom reponed without Payment of Coſts, unleſs the Decreet in Abſence obtained againſt them be very iniquous and irregular.

(*t*) A Decreet extracted, is of the Nature of a Decree inrolled; an Extract is an Exemplification or Authentick Copy of the Libel (or Declaration) and Judgment, and of the whole Proceedings.
(*u*) Such as fail to appear, and do ſuffer Judgment by Default. (*) Perſons above 21 Years.

But yet ſuch Decreets, even againſt *Minors* or *Abſents*, do ſtill ſtand good, and Execution againſt Perſons Lands and Goods is allowed to paſs upon them, until they be repealed; and it is much more eaſy to prevent than to repeal or reduce any Decreet; for even Decreets *in Abſence* has been often rendered effectual as to all Intents and Purpoſes, by Reaſon of their not having been quarrelled in due Time, and becauſe they are of themſelves a ſufficient Title to Preſcription.

And another Way of making ſuch Decreets tenace, is to take them out for no more than is truly owing, and can be legally inſtructed, and then even *when* they come to be reviewed, they will be confirmed.

And here it's obſervable, that there is in *Scotland* no ſuch Thing as Commitments for Contempt in any Civil Actions; for the Dignity of the Court ſurpaſſes the *Fictious*, and is attended with Authority enough for puniſhing any *real Contempt*, even in the greateſt of the Leiges.

And therefore tho' the Lords of Seſſion are veſted with a Power above the Laws, called, in Reſpect of its Eminence, their *Officium nobile*; and tho' they are in Deed, in Place of a Court of Chancery, yet inſtead of committing any Man for not entering his Plea, giving in his Anſwer, or making a Defence, the Conſequence only is, that he is holden as confeſt upon the Claim or Action, decerned in Abſence, and in Terms of the Libel, or of the Concluſions of the Summonds that had been *ante omnia* executed againſt him, either perſonally, or at his Dwelling Houſe, according to the *Will of the Summonds* above deſcribed; that is to ſay, if the Defendant having been ſummoned before the Court, faills to appear by himſelf or Council, (for he is not bound to appear in Perſon) or if he fails to anſwer, or to make any Defence; in that Caſe the Court, at the Requeſt of the Plaintiff, or his Council, pronounces a decretal Order, whereby there is decreed to the Plaintiff all that was contained in his Declaration, or all that is pray'd for by his Bill. For *Actore probante* (*x*) *vel reo abſente, reus condemnatur*; *& e contra Actore non probante, vel reo probante* (*y*) *Reus, abſolvitur.*

(*x*) His Claim. (*y*) His Plea or Defence.

But

But to return to the Thing which occaſioned this Digreſſion, *Noviter Veniens ad Notitiam*, is likewiſe excepted from *Competent* and *Omitted*; ſo that if any thing has lately come to the Defendant's Knowledge, he will not be cut off from the Benefit of it upon Pretext that the ſame had been formerly *Competent* and *Omitted*, provided that he be in Readineſs to make Oath that he knew nothing of the ſame *ab ante*; but then ſuch Matter lately emergent, ought to be ſome *Fact*, or founded upon ſome Writing as a Diſcharge, Receipt, or the like lately come to the Defendant's Hands; or otherwiſe if his new Plea or Allegation reſolves only into a contingent Point of Law, the ſame would be juſtly repelled, as having been formerly *Competent* and *Omitted*, notwithſtanding the Tender of an Oath that he had *ab ante* known nothing about ſuch contingent Point of Law.

But tho' theſe Exceptions are indeed very general and extenſive, yet it is obvious, and ſhall afterwards be ſhown, that there are many Caſes diſengaged of them, wherein *Competent* and *Omitted* is frequently found a very effectual Bar againſt reviewing the Decrees of any of the ſupream Courts.

But then againſt ſuch Reviews, there is yet a further Bar that is as extenſive, more ſecure, and admits of no Exceptions; and this is known in the Language of the Court, by the Term of *proponed* and *repelled*; for, as has been juſt now noted, the Extract of a Decreet is a full, exact and authentick Copy, not only of the Decree or Judgment it ſelf, but likewiſe of the Summonds Libel, Defences (*Declaration and Pleas*) and of the whole Proceedings; ſo that whatever has been proponed or alledged by either Party, during the Courſe of the Trial of the *Matter in Iſſue*, does clearly appear from his Extract; and what ſo appears to have been either directly or indirectly under Conſideration of the Court before pronouncing their Decreet or Decree, will never be allowed to be inſiſted on as a Ground or Argument for repealing or reviewing of the ſame.

And not only what appears from this Extract to have been expreſly *proponed* and *repelled*, will be rejected by the Judges; but likewiſe any Thing coincident with, or of leſs Import than what hath been ſo proponed and repelled, will be alſo over-ruled by them. And theſe

Terms of *Competent*, and *Omitted*, and *Proponed* and *Repelled*, were introduced into the ſupream Courts of *Scotland*, for preventing their Decrees from being ambulatory, or uncertain, for ſecuring the Obtainers of the ſaid Decrees, and ſuch as derived Right from them, and for preventing Pleas and Proceſſes from being protracted for any extraordinary Length of Time, *& ne lites ſint æternæ, & ut non daretur progreſſus in infinitum.*

And thus, after Appearances are *hinc inde* entered, and that a Decreet or Decree is upon Debate, or *in foro contentioſo*, obtained before any of the ſupream Courts, after the ſame is extracted and given out to the Party, there is no Place for repealing, altering, or reviewing the ſame, becauſe all that could be ſuggeſted for that Purpoſe, was either inſiſted upon before, and in that Caſe it was *proponed* and *repelled*; or elſe there was *ab ante* no Mention of it; and then after Extract the ſame cannot be heard, as having been plainly *Competent* and *Omitted.*

So that *Competent and Omitted, and Proponed and Repelled*, are the two Safe-Guards by which the Judgments of the ſupream Courts are carefully defended againſt all Attacks; and *Competent and Omitted*, with *Proponed and Repelled* are (if I may be allowed the Expreſſion) as two Centinels cloſely attendant on ſaid Decrees, and as it were guarding all Paſſes or Avenues, which might lead to any Attack upon them; or they may be ſaid to reſemble a double Hedge or Rampart, with which ſuch Decrees are ſafely invironed; and either to jump over the Hedge, or yet to break down the Rampart, were indeed to render the whole Securities of the Nation, precarious, ambulatory, and uncertain.

Having in the 2d Part of this Paper explained the Nature of *Dominium* and Property, and how the ſame is to be uſed and acquired; and having alſo ſhown how Obligations and Rights, whether heritable, or moveable, real, or perſonal, are begun and conſtituted; and how they may be voluntarily tranſmitted, either to univerſal or ſingular Succeſſors; and having likewiſe (in this 3d Part of my Paper) explained the Nature, Import and Effect of legal Actions and Judgments, and ſhown how they are guarded againſt Reviews *ob Authoritatem rei Judicatæ quæ pro veritate habetur*; and having alſo deſcribed the Nature

of the Executorials proceeding upon theſe Judgments, and how the Body may be ſeized, Liberty reſtrained, and after what Manner all Sort of *Dominium*, Property, or Right are thereupon legally evicted, or neceſſarily tranſmitted: It therefore only now remains to ſhow how *Property, Rights, and Actions* that may be ſo acquired, conſtituted, or conveyed, can be in like manner deſtitute, diſſolved or extinguiſhed.

And therefore the better to ſhow *that* it is neceſſary to notice, that all formal Deeds, Contracts, or Obligations, after they are regiſtered have the total Energy, Force, and Effect of Judgments; for regiſtrated Writes are by Law conſtructed to be Decreets (z): And thence it proceeds, that all Obligations, and Judgments may be diſſolved or extinguiſhed after the ſame or like Manner; and thus, as Conſent is neceſſary towards the Conſtitution of Obligations, and as a contrary Conſent does diſſolve and extinguiſh them; ſo a Judgment obtained may be reſcinded or diſſolved by a *contrary Judgment* or *Decreet of Reduction or Review.*

And all Manner of Rights, Judgments, and Obligations may be quaſhed or legally defeated by being either *judicially reduced*, or *ſimpliciter ſuſpended.*

The other Methods of diſſolving Rights, Judgments, and Obligations, are by *Compenſation, Acceptilation Innovation or Confuſion, or by Diſcharges or Releaſes, by Preſcription, or laſtly, by Implement, Satisfaction, or Conſignation,*

Compenſation is a Species of Payment; and it doth only take Place where it is inſtantly inſtructed, and where two Perſons are (in liquid Sums of Money) reciprocally Debtors to one another.

Compenſation is very agreeable to natural Equity, for Equity doth not permit one to purſue for that, which he muſt inſtantly reſtore to the ſame Perſon from whom he gets it; and it is more expedient to ſave, or prevent the Numeration or telling of Money, than to pay it firſt, and to be then left to ſue a Recovery of it. For which Reaſons Obligations are *ipſo Jure* extinguiſhed by Compenſation, and it by the Civil Law is defined to be *Crediti & debiti inter ſe Contributio.*

(z) Judgments.

By

By the Civil Law *Acceptilation* only took Place in verbal Obligations, as *being nothing but an imaginary Satisfaction, even of them*; however any Obligation may be defeat in *Scotland*, either by *Accepti ation*, or yet by a *Pactum de non petendo*; but yet both Methods are more properly a Way of evading or defeating, than of evacuating or extinguiſhing any Obligation.

But any Deed may be effectually extinguiſhed by *Innovation* or *Delegation*; that is either by changing the Obligation, or yet the Perſon of the Obligant, for when one Obligation is given in Satisfaction of another, that other Obligation is thereby innovated, and is conſequently vacated by ſuch *Innovation*.

Where Obligations are formally reduced into *Deeds*, or ſolemnly conſtituted by *Writ*; ſuch Obligations muſt be as formally and ſolemnly deſtituted as they were conſtituted; and that is ordinarily done by Deeds called Diſcharges or Acquittances; for *Scriptæ Obligationes ſcriptis tolluntur, & nudi Conſenſus obligatio contrario Conſenſu diſſolvitur*.

Suitable to the Difference betwixt *Uſucapion* and *Preſcription* in the *Roman* Law, *viz. That Uſucapio dat Dominium, Præſcriptio vere tantum cauſat exceptionem*; there is in *Scotland* the like Diſtinction betwixt the *poſitive* and the *negative Preſcription*; and ſince what is loſt at one Hand is ordinarily gained at another, ſo there can be no Doubt but Rights may be loſt as well as acquired by *Preſcription*.

And thus all *heritable and real*, as well as all perſonal Rights, and Actions do preſcribe in forty Years; that is to ſay, they are cut off and extinguiſhed, if they be not inſiſted upon within that Space.

Holograph Bonds and Subſcriptions in Compt Books preſcribe in twenty Years; and the Delivery of Goods, or Bargains to be proved by Witneſſes, (for Promiſes or the Emiſſion of Words cannot be ſo proved) do preſcribe in five Years, as to that Manner of Probation.

Servants Fees and Merchant-Compts, preſcribe in three Years, and there are alſo ſundry other Preſcriptions well enough known in *Scotland*, but which are too numerous as well as unneceſſary to be here mentioned.

However it is neceſſary to notice, that the Grantor of any Obligation cannot have any Benefit by Preſcription, during his own Life, unleſs he will be tempted to Perjury; for tho' the Bond or Action were

legally preſcribed, yet the Creditor could always refer *Reſting and Owing* to his Debitor's Oath, and would ſo recover the Money, unleſs the Debitor did ſwear that he had actually paid it, or that the ſame was not truly owing.

Theſe *Preſcriptions* are introduced for two Reaſons, to wit, partly to puniſh the Negligence of the Proprietor, who ſhould not have deſerted his Right, or at leaſt ſhould have ſooner owned it, and partly to ſecure and encourage Poſſeſſors, and their ſingular *Succeſſors (a)*.

But becauſe theſe Preſcriptions are only allowed for publick Utility, and are in a Manner contrary to the Law of Nations, which allows no Man's Right to be taken away without his own Conſent, they are therefore unfavourable and to be ſtrictly interpreted, and are indeed reckoned *de Momento in Momentum*; ſo that Preſcription takes not Place until the laſt Moment of the Time allowed be expired; and any deed whereby the true Proprietor doth ſhow an Intention of following forth and owning his Right, will interrupt or prevent the Preſcription.

Preſcription in moſt Caſes doth not run againſt Minors, becauſe Negligence is not puniſhable in them; and Perſons unable to proſecute their Rights, ought not to be hurt by Preſcription; as for Inſtance, if a Perſon ſtanding baniſhed or forfeited for Treſon, ſhould afterwards be reſtored by Way of Juſtice, or (*per Modum Juſtitiæ*), or by finding and declaring that he had been unjuſtly or unduely forfeited; in that Caſe I perceive that *Preſcription* could not run againſt ſuch a Perſon, during the Courſe of his *Proſcription*; for the Law cannot puniſh him for not doing that which was impoſſible for him to have done, and therefore *contra non valentem agere non currit Præſcriptio.*

The ſhort and beſt Way of ſopiting both Actions, and Obligations is by Implement and Satisfaction; for he who fairly pays or performs his Obligation, doth thereby diſſolve and extinguiſh the ſame in the moſt ſtrict and ample Terms.

And this Method of diſſolving Obligations is ſo very favourable that Payment made *bona fide* is frequently ſuſtained, tho' not made to the direct Creditor, or to the Perſon having Right to receive it; for here the Law commiſerates the Caſe of the *Payer*, *Quia durum eſt bis idem ſol-*

(*a*) Singular Succeſſor, what? See p.

vi, and only reſerves Action to the Creditor, againſt the Receiver, that is, againſt his own *Inſtitor*, *Factor*, *or Mandatory*, or againſt ſuch other Perſons as took upon them to uplift the Money, or to receive Payment thereof in his Name.

The legal, real Offer, and actual *Conſignation* of Money, after ſuch Manner, and at ſuch Time and Place, as are ſtipulate, will ſtop the Courſe of Intereſt, tranfer the Riſque of the Money, liberate the Debitor, and have all the other Effects of Payment; unleſs the Creditor ſhow ſome legal and ſufficient Reaſon for refuſing his Money, after he had been formally and ſolemnly deſired and required to accept of the ſame. From all which the Reader may (by this Time) perceive how *Obligations*, *Rights* and *Actions*, are conſtitute, conveyed, and deſtitute:

And having thus briefly delivered the cleareſt Notions that I could ſuggeſt concerning *Perſons*, *Rights*, and *Actions*, I ſhall only *add*, that the ultimate End and Uſe of *all* that the Civilians teach concerning the *objecta Juris*, or their *Perſonæ*, *res*, *& Actiones*, is to cultivate the Mind, illuminate the Underſtanding, give Latitude to the Imagination, and to clear up, or corroberate the Judgment, and above all Things, to inſtruct Mankind *honeſte vivere*, *alterum non lædere*, *& ſuum cuique tribuere*; For upon theſe *three Precepts* dependeth the whole Law, and all good Laws are intirely intended to facilitate the *Explication* or *Application* of them; but he has indeed been a notable *young Lawyer* (*b*), and an Honour to his *Profeſſion*, (who without the Help of Explications) *kept them all from his Youth up!* For theſe are truly thoſe *Golden Rules*, which being exactly followed, muſt undoubtedly bring a Man to *Peace at the laſt*; and which conſequently all Men ought to keep *as the Apple of the Eye*, *to bind them upon their Fingers*, *and to write them upon the Table of their Hearts*; and therefore I ſhall conclude this Paper, by *verſioning them*, and that without adding to their Number, or derogating from their Amplitude; For in plain *Engliſh*, the Purport of all *the three*, is only *to live innocently*, *and to render unto every* one *his own.*

(*b*) Mat.

FINIS.

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FINIS.

ERRATA.

Preface, p. 7. par. 2. l. 2. for doth read *do.*

PAge 1. line 4. for Armies read *Arms.* p. 4. par. 3. l. 3. for Prerimitur, read *Perimitur.* p. 7. par. 7. l. 1. for Tria, read *Trial.* p. 21. par. 6. l. 5. for well truly, *well and truly.* p. 28. par. 4. l. 2. for Cartneſs, *Caithneſs.* p. 31. par. 5. l. 3 for Highland Lands, *Highland Lairds. Ibi* for Chiftains, *Chiefs.* P. 36. par. 5. l. 9. for Treatiſe, *Treatiſes.* P. 37. par. 1. l. 2. for And, *Or.* P. 40. par. 1. l. 5. for not Conſenting, *not of Conſenting.* P. 44. par. 2. l. 10. for Decyferation, *Decypheration.* P. 46. par. 7 l. 2. for of Commixtion, *by Commixtion.* P. 56. par. 2. l. 8. for Inſtitutors, *Inſtitors.* P. 66. par. 9. l. 3. for few Duetys, *feu Duety.* P. 69. par. 3. l. 1. for Tites, *Tithes.* P. 72. par. 1. l. 4. for Poſſeſſiors, *Poſſeſſors. Ibi.* l. 6. for Denominant Lands, *Dominant Lands.* P. 73. par. 3. l. 7. for exerciſing, *exerciſe.* P. 103. par. 1 l. 2. for of, *off.* P. 108. par. 1. l. 7. for Intentional, *Intention or.* P. 111. par. 3. l. 2. for apprehended, *apprehend.* P. 114. par. 1. l. 5. for has, *have.* P. 117. par. 4. l. 2. for Acceptiation, *Acceptilation.* P. 118. par. 1. l. 3. for Acceptiation, *Acceptilation.*

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